2009 LSBC 11
Report issued: April 16, 2009
Citation issued: February 6, 2007

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Gerhard Schauble

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing dates: July 22, 23, 24 and December 10, 2008

Panel: James D. Vilvang, QC, Chair, William F.M. Jackson, Brian J. Wallace, QC

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: David W. Donohoe

Background

[1] This hearing was conducted at the direction of the Chair of the Discipline Committee of the Law Society of British Columbia, pursuant to a citation issued February 6, 2007, as amended April 17, 2007 (the " Citation").

[2] In the Citation, the Law Society describes the Respondent's conduct at issue in this hearing as follows:

> 1. While practising with Salloum Dirk and later Salloum & Company, your conduct in rendering accounts to clients of Salloum Dirk or Salloum & Company for fees and accepting payment of those fees without the knowledge or authority of Salloum Dirk or Salloum & Company or the principals thereof as follows:
>
> (a) rendering a statement of account to MS for fees in the sum of $75,000.00 plus taxes on or about July 23, 2003, and accepting payment of same;
>
> (b) rendering a statement of account to EH for fees in the sum of $7,500.00 plus taxes on or about July 24, 2003, and accepting payment of same; and
>
> (c) rendering a statement of account to MH for fees in the sum of $7,740.27 plus taxes on or about September 4, 2003, and accepting payment of same.

[3] On January 8, 2004, Mr. Salloum commenced an action in the BC Supreme Court against the Respondent and also made the complaint that led to this Citation. The Respondent filed a counterclaim. The investigation of the complaint was held in abeyance pending the conclusion of the litigation, which was settled in February 2005.

[4] The Law Society says that three issues arise with respect to all of the clients referred to in the Citation:

(a) Whether the clients were firm clients or the Respondent's clients;

(b) If the clients were the Respondent's, whether he had received authority from Mr. Dirk to take the clients as his own;

(c) If the clients were firm clients, whether the Respondent was entitled to set off amounts paid to him by those clients against amounts owed to him by Mr. Salloum.

[5] At the opening of the hearing, the Law Society applied, pursuant to Rule 5-6(2) of the Law Society Rules, to exclude the public from the hearing during the testimony of witnesses, and to seal any exhibits and portions of the transcript that might disclose the identity of the clients. The application was based on solicitor-client privilege. The Respondent consented. The Panel made the order sought. The exhibits that are subject to the order and the transcript of the testimony of witnesses have been marked accordingly. The Panel has written this decision keeping in mind the need to protect solicitor-client privilege.

[6] The parties filed a Statement of Agreed Facts at the hearing. The Law Society called as witnesses Paul Henry, Michael Dirk and Lawrence Salloum. Mr. Salloum was in practice with the Respondent for all of the time in question. Mr. Dirk was in partnership with Mr. Salloum for part of the time. Mr. Henry valued that partnership in the context of a dispute between Mr. Salloum and Mr. Dirk on its breakup.

Facts

[7] In June 2001, the Respondent entered into an agreement with the firm of Salloum Dirk (the " 2001 Agreement"), pursuant to which the firms were to " practise together" , to use the neutral term from the Respondent's newspaper ad at the time. In his opening, Mr. Donohoe referred to the arrangement as " not a partnership" and stated that the Respondent was an " independent contractor" . The Respondent's announcement letter said, " Schauble & Company is merging with the law firm of Salloum Dirk" and described the venture as " the new firm" .

[8] By notice to the Respondent given on December 30, 2002, Salloum Dirk terminated the 2001 Agreement effective February 1, 2003. Messrs. Salloum and Dirk terminated their partnership on January 31, 2003, and effective the next day, Messrs. Salloum and Schauble entered into an agreement (the " 2003 Agreement"), in essentially the same terms as the 2001 Agreement[1] (collectively, the " Agreements"). The law firms of Salloum Dirk and Salloum & Company are referred to in this decision either separately or collectively as the " Firm" .

[9] The 2001 Agreement contained the following provisions that are relevant for this hearing:

(a) Paragraph 4 ? The parties acknowledge that Schauble & Company is under no obligation to provide a minimum number of hours to Salloum Dirk or generate a minimum amount of income or legal fees during any particular period hereunder.

(b) Paragraph 5 ? Salloum Dirk acknowledges and agrees that Schauble & Company may participate in the provision of legal services and other activities (whether for remuneration or not) outside of this Agreement, including the provision of legal services to charities, non-profit organizations and the operation of the mediation practice and sports agency.

(c) Paragraph 7 ? Schauble & Company shall retain the goodwill of its law practice, including its clients and its assets (" the retained assets") as follows:

(i) The mediation practice known as Opus Mediation Services and the sports agency known as GES, Inc.

(ii) Schauble & Company file #'s 3766 and 5743.

(d) Paragraph 8 ? Schauble & Company may utilize some retained assets for the provision of legal services under this Agreement. Schauble & Company may use such of Salloum Dirk assets as set out herein, including its computer, administrative and accounting systems, secretarial personnel, furniture and equipment, precedents, library, supplies and other resources and assets of Salloum Dirk.

(e) Paragraph 9 ? Salloum Dirk agrees to pay to Schauble & Company fifty (50%) of all gross legal fees billed by Schauble & Company and collected by Salloum Dirk.

The relevant terms of the 2003 Agreement were not materially different, except that at paragraph 7 (renumbered as 8), file #5743 was the only named file retained by the Respondent as part of his " goodwill" .

[10] MS was a client with a personal injury claim whose file (the " S file") was transferred by the law firm of Bishop & Company to the Respondent on October 2, 2002 while he was practising with the Firm. He opened the file on or about October 16, 2002 and entered into a retainer agreement dated October 16, 2002 with MS.

[11] The S file was settled for $304,000 in July 2003. The cheque for that amount was received from ICBC payable to the Firm and deposited in the Firm's trust account on July 24, 2003. The funds were distributed on July 24 and 25, 2003 on the Respondent's instructions as follows:

(a) a cheque for $9,270.77 to Bishop & Company,

(b) two transfers to the Firm's general account: one in the amount of $872.44 for fees and disbursements on an unrelated matter for MS and one in the amount of $3,897.95 for disbursements on the S file,

(c) two cheques to CIBC: one in the amount of $46,853.78, and one in the amount of $39,021.22, and

(d) a cheque for the balance of $204,083.84 payable to MS.

[12] The Respondent rendered an account dated July 23, 2003 to MS as a Schauble & Company account for $75,000 plus GST and PST of $10,875, for a total of $85,875. The two cheques to CIBC totaled $85,876.06. Initially, the Respondent's instructions had been to issue a trust cheque to Schauble & Company for fees. The effect of issuing the cheques to CIBC was to hide the fact that the fees had been paid to Schauble & Company.

[13] The Statement of Agreed Facts described the payments to CIBC as being " on MS's behalf" and said, " MS paid this account [being the account rendered by the Respondent] directly to Schauble & Company." However, the evidence at the hearing established that, to pay his account, the Respondent issued the two Firm trust cheques from the settlement proceeds to CIBC for his benefit.

[14] The S file was ongoing at the time of the dissolution of the Salloum Dirk firm at the end of January 2003. In June 2003, Mr. Dirk retained Mr. Henry, a Kelowna lawyer, to value the Firm for the purpose of an arbitration arising from the dissolution. Mr. Henry included the S file in his report but, based on the Respondent's advice, excluded it from the division of fees.

[15] EH and MH were clients of Mr. Dirk, who referred them to the Respondent for personal injury claims in

March 2002. The Respondent opened the files (the " H files").

[16] The claim of EH was settled on July 23, 2003 for $25,000 and that of MH on September 3, 2003, for $30,000. At the Respondent's request, ICBC issued cheques for the settlements to Schauble & Company. On July 24, 2003, the Respondent rendered a Schauble & Company statement of account to EH for $7,500 plus taxes and on September 4, 2003, rendered a Schauble & Company account to MH for $7,740.27 plus taxes.

[17] The H files were also ongoing at the time of the dissolution of the Salloum Dirk firm. However, the H files were not included in Mr. Henry's valuation report.

[18] Although the S and H files were opened in 2002 and were active at the date of the 2003 Agreement, neither was added to the files listed at paragraph 8 of the 2003 Agreement as being retained by the Respondent as part of his " goodwill" .

[19] Mr. Henry delivered his report on July 18, 2003. Although the H files were on a list of files Mr. Dirk had given Mr. Henry, they were not included in the report.

[20] Mr. Henry referred to the S file in the report as a " file from Schauble & Company" , and as " excluded from valuation." Mr. Henry testified that the references meant that the S file had come from the Respondent's previous law practice. However, in cross-examination, he could not recall " the specific detail" of the conversation in which the Respondent told him that.

[21] Mr. Henry excluded the S file from the valuation in the first typed draft of his report on July 15, 2003, but it had been included in his handwritten draft as late as July 10.

[22] In late June or early July 2003, the Respondent told Mr. Henry of his grievances about Mr. Salloum. He felt Mr. Salloum had betrayed him; that Mr. Salloum had not kept his side of their bargain. In particular, he was upset that Mr. Salloum had referred a number of personal injury files to a lawyer in Penticton.

[23] Ms Rai asked Mr. Dirk about his understanding of the 2001 Agreement. He said that the Respondent was entitled to keep any fees billed on the files he brought with him from Westbank but that on " files opened afterwards we were to share fees 50/50. The disbursements would be paid out and fees would be 50/50 for work done on any new files or any files that we turned over to him." Mr. Dirk also said it was his understanding that the Respondent was not entitled to carry on a practice outside the firm.

[24] This exchange then followed:

> Q. Would you have agreed to any agreement that would allow him to do that?
>
> A. I don't think so. You know, why would we have Mr. Schauble there when we were going to pay all of the disbursements and he would get all of the income? There is no sense of having him there.
>
> Q. So what was the purpose behind -
>
> A. Other than doing this stuff, the mediation and the files that he brought with him and this charity and that sort of thing. Those he was entitled to 100 per cent.

[25] Mr. Dirk testified that he had assumed that the Respondent had brought the S file with him from his Westbank practice so that the Firm was not entitled to any of the fees. As to the H files, Mr. Dirk said that he did not tell the Respondent that he could retain 100% of the billings. He had referred the H files to the Respondent and anticipated the Firm would receive 50% of the fees.

[26] Mr. Donohoe pressed on Mr. Dirk in cross-examination that he and the Respondent discussed treating

the S and H files as Schauble & Company files:

> Q. I suggest to you that you and Mr. Schauble had a discussion about the [H and S] files sometime in the weeks just before the arbitration hearing.
>
> A. I do not recall that.
>
> Q. And that Mr. Schauble indicated that he was treating the [S and H] files as Schauble & Company files and -
>
> A. No, that did not happen. That I would have remembered. The [S] file I had always assumed was one of the files he brought with him from the west side, so I didn't think that Salloum and I were entitled to any share of that. But at no time did I discuss with Mr. Schauble that the [H] file would be his file, Schauble & Company, not ever. That I would have remembered.

[27] Mr. Donohoe put to Mr. Dirk four letters that Mr. Dirk had written, which Mr. Donohoe suggested could be read as inconsistent with Mr. Dirk's evidence at the hearing. We refer to two of the letters. Of the October 16 letter to the Respondent, Mr. Dirk said:

> The last sentence there: " Insofar as I'm concerned you have every right and permission and authorization to retain those files as Schauble & Company files." By that I meant as and when you leave. Not while you are still here. That's what I meant by that.

[28] On his October 22 letter to Mr. Salloum, Mr. Dirk noted that:

> The third paragraph says: Prior to leaving in January I told Schauble that insofar as I was concerned he was entitled to take away with him those personal injury claim files that he was authorized to take with him by his clients.

[29] In the October 22 letter, Mr. Dirk noted " that Schauble could provide legal services outside the agreement whether for remuneration or not" . He testified that meant, " He would have his mediation, he would have his charitable, he would have his sports."

[30] Mr. Dirk was aware that the Respondent had problems with Mr. Salloum. In particular, Mr. Salloum's daughter, as receptionist, referred all cold calls to Mr. Salloum, rather than referring them to each of the lawyers on a weekly rotation as they had agreed. Mr. Dirk shared the Respondent's view. Mr. Dirk was also aware that the Respondent was complaining that Mr. Salloum was keeping motor vehicle files that should have gone to the Respondent.

[31] Mr. Salloum testified that he first learned of the S file in October 2003, after the Respondent had left the Firm. He said that his secretary had found a letter relating to the file when she was cleaning the Respondent's old office. On her own volition, she pulled the trust records for the file and gave both documents to him. The Respondent said he told Mr. Salloum that the S and H files were exempted from the Henry report when they had a five-minute meeting just prior to the arbitration in July 2003.

[32] The Respondent called as witnesses, three former assistants who worked at the Firm during the time he was there. They confirmed the interpersonal tensions in the office, Mr. Salloum's decision to stop referring personal injury files to the Respondent, and the Respondent's complaints to Mr. Salloum.

[33] The Respondent testified that he was induced to move his practice from Westbank and to join the Firm by the assurance of being referred all of the Firm's personal injury work and by having other lawyers available to provide backup while he was engaged in other activities.

[34] The Respondent testified he opened the H files when they came in as Schauble & Company files, after a confrontation with Mr. Salloum over Mr. Salloum having " effectively snagged [his] Westbank clients" :

> When the [H] files came in, we had just had a meeting with Mr. Salloum and Mr. Dirk, and Mr. Dirk had ? was very aware that Mr. Salloum had reneged on his agreement. They came in, were referred to me by Mr. Dirk and it was in this very emotional, heated environment that I asked Mr. Dirk, " May I open this as a Schauble file?" His answer was, " Yes."

As noted, Mr. Dirk in his testimony denied agreeing to this.

[35] The Respondent also testified, contrary to Mr. Dirk's evidence, that he sought and received Mr. Dirk's approval to retain the S file and the H files as Schauble & Company files. He did not speak to Mr. Salloum about doing so until July 2003 on his evidence, or October 2003 on Mr. Salloum's evidence.

[36] In his explanation of why he decided that he was entitled to retain all of the fees from the S file the Respondent suggested that he was trying to balance what he estimated Mr. Salloum had diverted from him by not referring personal injury files to him. He concluded as follows:

> I got a sense from [Mr. Salloum's legal assistant] how many files were being opened and I very roughly calculated that there was about $100,000 in fees that Salloum had diverted to himself that were supposed to be going to me. As well, Mr. Salloum often bragged when he was able to settle something with ICBC and gave me the amount he made off the file. So, you know, I did a rough calculation from those two sources.

[37] The Respondent gave evidence of his loss of trust in Mr. Salloum. He cited several incidents, including one where Mr. Salloum refused to assist with a document on one of his files, when he was out of the office. The Respondent summarized his view of this as follows:

> Again, if I can categorize it as a deal buster, that I would be ? I mean, if I back up, there was absolutely no point in leaving Westbank if I can't get somebody to back me up on my files ... I had no more trust in Mr. Salloum.

[38] Of his view that Mr. Salloum was diverting his clients, the Respondent said, " I recorded the loss of earnings, made a mental note of that."

[39] Both the Respondent and Mr. Dirk recall a discussion on Mr. Dirk's departure about the S file and the H files. The Respondent recalls it as follows:

> I asked him if I could - because I didn't know what the fee split was with Salloum and Dirk. I was not ? I had no issue with Dirk. My issue was with Salloum. I asked him if I could retain the two personal injury files that I had opened and he said, " Yes," as long as the clients consented to it.

[40] Mr. Dirk testified as follows about this conversation, immediately following his evidence quoted at paragraph 28 of these reasons:

> Q. You did talk about these two files immediately before you departed Salloum Dirk?
>
> A. Yes.
>
> Q. And you told him that he could continue to represent these clients if they were agreeable to his representing them?
>
> A. Yes.

Q. And I suggest to you that he told you at that time that he was treating those two files as Schauble & Company clients?

A. No.

Q. And you indicated ?

A. He did not.

Q. All right. I suggest to you that you indicated to him that if he departed he was entitled to take those files with him and claim the fees?

A. With the consent of the clients. It was the clients who decide what file goes with what lawyer when the law firm split up, and yes, he would be entitled to 100 per cent of the fees from the date that he took the files and left with him, but the work prior to that time would still be a 50/50 split. At no time did I tell Mr. Schauble that he was entitled to 100 per cent of the money from the [H] files.

The Law Society's Position

[41] The Law Society's position is that MS, EH and MH were clients of the Firm; that the fees earned should have been shared in accordance with the Agreements, and that the Respondent's conduct in treating the fees as from his separate practice, amounts to professional misconduct.

The Respondent's Position

[42] The Respondent says that the clients were not clients of the Firm but rather were the Respondent's clients in his separate practice, which was contemplated by the Agreements. The Respondent also says that he confirmed with Mr. Dirk his right to retain the fees in respect of these clients. In the alternative, the Respondent says that he was entitled to retain the fees earned at issue as a set-off for earnings lost as a result of Mr. Salloum's breach of the Agreements.

Analysis

[43] The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: " ... evidence must be scrutinized with care" and " must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But ... there is no objective standard to measure sufficiency." (*F.H. v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193).

[44] What is it that the Law Society must prove, given that this is a discipline hearing, not a civil trial? In our view, we are not, strictly speaking, required to determine whether the Respondent had a legal right to keep 100% of the fees from the S and H files, but rather whether he honestly believed that he did.

[45] We would put the facts we have to decide as follows:

(a) Did the Respondent honestly believe that, under the terms of the Agreements, he was entitled to retain all of the fees from the S and H files rather than sharing the fees with the Firm?

(b) Did the Respondent believe that he was entitled, as a result of discussions with Mr. Dirk, to treat the clients as his own and not share the fees with the Firm?

(c) If the clients were Firm clients, was the Respondent entitled to retain the fees paid to him by those

clients as a set-off against amounts he says were owed to him as a result of breach of the Agreements by Mr. Salloum?

[46] On behalf of the Respondent, Mr. Donohoe argued that perhaps there had been some miscommunication between the Respondent and Mr. Dirk so that Mr. Dirk mistakenly granted authority to the Respondent to take the entire fee or that the Respondent honestly but mistakenly believed that he had such authority from Mr. Dirk.

[47] We have carefully considered that argument and carefully analyzed the evidence to determine whether it was a realistic possibility that the Respondent's actions could have arisen from miscommunication or misunderstanding.

[48] The Respondent says that he interpreted the Agreements as allowing him to decide which files he would conduct as files of the Firm and which he would keep for himself. He relies on the following words in paragraph 5 of the Agreement for that interpretation: " Schauble & Company may participate in the provision of legal services and other activities (whether for remuneration or not) outside of this Agreement including the provision of legal services to charities, non-profit organizations and the operation of the mediation practice and sports agency."

[49] However, given the purpose of the Agreements, and in the context of the Agreements as a whole, those words cannot be read to permit the Respondent to select what part of the fees from his law practice he will share and what he will keep for himself. His assurance that he would exercise that right fairly is of no assistance in interpretation.

[50] The purpose of the Agreements was to provide the Firm with a contribution to its overhead in exchange for the Respondent having the benefits of that infrastructure. The Respondent's interpretation would defeat that purpose; he would use the Firm's infrastructure, which, in fact he did, and be at liberty to withhold whatever part of his contribution he chose. Such an agreement would make no commercial sense.

[51] Looking to the words themselves, the right to provide legal services outside the Firm is granted in the context of the Respondent's " other activities" . In our view, that right can be read as limited to providing legal services that are related to those other activities.

[52] Significantly, the 2001 Agreement specifically named two files that the Respondent was entitled to exclude from the 2001 Agreement as part of Schauble & Company's goodwill. By the time the 2003 Agreement was entered into, the reference to one of those files was removed, presumably because it had been closed. Clearly, the Respondent put his mind to what files were to be excluded from the 2003 Agreement. The S and H files had been opened by then. If they were to be excluded, one would have expected to find them referred to there.

[53] Mr. Dirk was under no misapprehension as to what the 2001 Agreement intended. When asked about it, he said, " why would we have Mr. Schauble there when we were going to pay all of the disbursements and he would get all of the income? There is no sense of having him there." That is a credible response; it is consistent with our finding as to the interpretation of the Agreements, and Mr. Dirk had no interest in the outcome of this proceeding.

[54] On the other hand, the Respondent's assertion as to what he believed the Agreements meant is not credible. It is inconsistent with the only sensible interpretation and it is self-serving. Further, the Respondent says that he sought and obtained Mr. Dirk's permission to open both the S file and the H files, as Schauble & Company files. If he honestly believed he had the right under the 2001 Agreement to open whatever files he wished that way, why would he ask Mr. Dirk's permission?

[55] In any event, Mr. Dirk says that permission was neither sought nor granted. When asked about it in cross-examination, he said, " No, that did not happen. That I would have remembered. The S file I had always assumed was one of the files he brought with him from the west side, so I didn't think that Salloum and I were entitled to any share of that. But at no time did I discuss with Mr. Schauble that the H file would be his file, Schauble & Company, not ever. That I would have remembered."

[56] The Respondent submits that we should accept both Mr. Dirk's evidence that he intended to convey to the Respondent that he could keep the S and H files if he left the Firm and the Respondent's evidence that he understood that he could treat the files as Schauble & Company files while still practising with the Firm. We do not accept the Respondent's assertion about his understanding of the conversations with Mr. Dirk. As noted above, that assertion is contrary to the only rational interpretation of the Agreements, but also it is inconsistent with the Respondent's testimony about his conversation with Mr. Dirk in early 2003. He said this about that discussion: " I asked him if I could retain the two personal injury files that I had opened and he said, "Yes,' as long as the clients consented to it." The caveat, " as long as the clients consented to it," makes no sense if the clients were the Respondent's clients.

[57] Scrutinizing the evidence in this case requires an assessment of the credibility of the witnesses. In doing so, " ... the real test of the truth of the story of a witness ... must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." (*Faryna v. Chorney*, [1952] 2 D.L.R. 354, [1951] BCJ No. 128 (CA) at para. 10). In assessing credibility, we also considered whether the witness had an interest in the outcome of this proceeding.

[58] As to the Respondent's assertion that he had Mr. Dirk's permission to open the S and H files as Schauble & Company files, we prefer Mr. Dirk's evidence. It is in " harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in that place and in those circumstances. (*Faryna v. Chorney, (supra))*. And, as noted above, Mr. Dirk had no interest in the outcome of this proceeding.

[59] The Respondent's conduct in billing the S file is also inconsistent with his assertion that he believed he had the right to retain all the fees earned from that file. Rather than have his fees paid as required by the Law Society Rules, by a cheque from the Firm's trust account to Schauble & Company or to himself personally, he had the money paid directly to his bank for his benefit. We are satisfied on all of the evidence that he did so for the sole purpose of hiding the true nature of the payments from Mr. Salloum.

[60] Finally, the Respondent says that he was entitled to keep the fees from the S and H files as a set-off against Mr. Salloum's breach of the Agreements by diverting clients and refusing to refer personal injury files to him. Even if that assertion might have merit in a civil action, it has none where the question is one of professional conduct. The Respondent had a professional duty to treat Mr. Salloum with the utmost candour. Whatever balancing might have been merited, the Respondent was not entitled to take an amount equal to that which he estimated he was owed. If the Respondent had an honest belief he was entitled to the money, he should have told Mr. Salloum exactly what he was doing and why he was doing it.

[61] We find that the Respondent was not entitled to keep the fees from the S and H files for himself rather than split them with the Firm, and that he did not honestly believe he was entitled to do so. Rather, the Respondent knowingly and intentionally misappropriated the funds.

[62] Accordingly, we find that the Respondent has committed professional misconduct.

[1] The panel does not consider the differences in the terms to be significant for the matters at issue in this hearing The differences include:

a. Mr. Salloum acknowledged in the 2003 Agreement that the Respondent " is undertaking a world record flight attempt; "

b. Under the 2001 Agreement, Salloum Dirk was to pay Schauble & Co. the costs of its existing lease;

c. Remuneration to be paid by Salloum & Company to Schauble & Company was reduced from 50% of all gross legal bills to 40% of the first $20,000 per month and 50% thereafter;

d. Specific terms were added as to the disposition of files in the event of termination;

e. Only the 2001 Agreement included a statement of the parties' future intent to form a partnership.