

2009 LSBC 24

Report issued: August 12, 2009

Citation issued: June 19, 2007

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

David William Blinkhorn

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: May 12, 2009

Panel: Leon Getz, QC, Chair, Haydn Acheson, Herman Van Ommen

Counsel for the Law Society: Jaia Rai

No-one appearing on behalf of the Respondent

Background

[1] The original citation in this matter was authorized by the Discipline Committee of the Law Society on March 1, 2007. It was issued on June 19, 2007 and served on the Respondent as required. Subsequently, on December 13, 2007 the Discipline Committee authorized certain amendments to the citation and, as amended, it was served on the Respondent, Mr. Blinkhorn, on January 4, 2008. The Respondent has acknowledged service, and there is no issue about it.

[2] The Respondent did not appear at the hearing. Section 42 of the *Legal Profession Act* says that, in the circumstances, we " may proceed with the hearing." At the commencement of the proceeding, counsel for the Law Society, Ms. Rai, informed us that she understood that the Respondent had received medical advice that it would be inadvisable for him to appear. We accordingly decided to proceed in his absence.

The Citation

[3] The amended citation directed an inquiry into the Respondent's conduct detailed as follows:

Your Conduct Concerning Your Client DV

1. In the course of your representation of DV in matrimonial proceedings, you gave an undertaking, in a letter dated May 10, 2002, to DR, counsel for CV, to hold in trust certain proceeds from the sale of their matrimonial home pending settlement of the matrimonial litigation or further order of the court. You were bound by that undertaking and breached it by failing to hold said funds in trust.
2. You misappropriated funds held in trust on behalf of CV and your client, DV, representing proceeds or partial proceeds from the sale of their matrimonial home by your withdrawal of said funds

from trust for purposes other than which you were entitled to.

Your Conduct Concerning Your Clients JP and RB

3. In the course of your representation of JP and RB, purchasers of real property, you accepted an undertaking imposed by the vendor's solicitor in a letter dated October 6, 2005 to hold in trust a builder's lien holdback in the amount of \$15,000. You were bound by that undertaking and breached it by failing to hold in trust the holdback amount of \$15,000.

4. You misappropriated funds in the amount of \$13,325 held in trust for a builder's lien holdback pursuant to an undertaking provided to the vendors' solicitor in the course of your representation of the purchasers, JP and RB, by your withdrawal of said funds from trust for purposes other than which you were entitled to.

Your Conduct Concerning Your Client KH

5. You misappropriated funds in the amount of \$21,078.67 representing settlement proceeds held in trust on behalf of your client, KH, by your withdrawal of said funds from trust for purposes other than which you were entitled to.

Your Conduct Concerning Your Client TN

6. You misappropriated funds in the amount of \$750 received from your client, TN, as a retainer when you deposited said funds into your personal bank account instead of your trust account.

7. In the alternative, you breached Law Society Rule 3-51 when you deposited into your personal bank account instead of your trust account \$750 received from your client, TN, as a retainer.

Your Conduct Concerning Your Client DJ

8. You misappropriated funds received from CIBC representing refinancing proceeds or partial proceeds in relation to the refinancing of a property and held in trust for your client, DJ, by your withdrawal of said funds for purposes other than which you were entitled to.

Your Conduct Concerning the Estate of PT

9. You misappropriated funds held in accounts in the name of the Estate of PT and held in trust for the beneficiaries of the Estate by your withdrawal of said funds for purposes other than which you were entitled to in the course of acting as solicitor and executor of the Estate.

Your Conduct Concerning Your Client CS

10. You misled your client, CS when you made representations to her in approximately February, 2005 that you knew were false concerning the status of her litigation involving GV, and in particular your statements that GV had agreed to pay CS certain amounts every year from 2005 to 2008.

Your Conduct Concerning Your Client KSD

11. You misappropriated funds in the amount of \$7,138.73 received from or on behalf of your client, KSD, and held in trust on his behalf by your withdrawal of said funds from trust for purposes other than which you were entitled to.

Your Conduct Concerning Your Client ST

12. You misappropriated funds in the amount of \$16,561.37 representing settlement funds received from ICBC and held in trust on behalf of your client ST by your withdrawal of said funds from trust for purposes other than which you were entitled to.

Your Conduct Concerning Your Clients M and DG

13. You misappropriated funds in the amount of \$9,279.22 representing partial proceeds received from the sale of the matrimonial home of your clients M and DG and held in trust on their behalf for purposes of payment to CMHC by your withdrawal of said funds for purposes other than which you were entitled to.

Your Conduct in Misleading the Law Society

14. You misled the Law Society by stating in a letter to the Law Society dated March 21, 2006 that you had that day paid RK for his account for services rendered in relation to the matter of the Estate of LH when you had not done so.

Your Conduct in Breaching Law Society Rules, Part 3, Division 7

15. For various periods between 1999 and 2006, you failed to maintain a record of all funds received and disbursed in connection with your law practice and retain supporting documents for your trust and general accounts, in accordance with Law Society Rule 3-59.

16. For various periods between 1999 and 2006, you failed to maintain trust account records in accordance with Law Society Rule 3-60.

17. For various periods between 1999 and 2006, you failed to maintain general account records in accordance with Law Society Rule 3-61.

18. For various periods between 1999 and 2006, you failed to keep billing records in accordance with Law Society Rule 3-62.

19. For various periods between 1999 and 2006, you failed to record trust and general transactions in accordance with Law Society Rule 3-63.

20. For various periods between 1999 and 2006, you failed to prepare monthly trust reconciliations in accordance with Law Society Rule 3-65.

21. You failed to make written reports to the Executive Director when the amount of funds in your pooled trust account were insufficient to meet all of your trust obligations at various times in the period between 2000 and 2006, in breach of Law Society Rule 3-66.

Your Conduct in Failing to Respond to the Law Society

22. Pursuant to Law Society Rule 4-43, an order was made that an investigation be made of your books, records and accounts and a Law Society staff auditor was designated to conduct the investigation. You failed to immediately produce and permit the copying of all files, vouchers, records, accounts, books or other evidence and failed to provide explanations that the auditor required for the purpose of the investigation, as requested by the auditors in letters to you dated September 6, 2006, October 5, 2006, December 12, 2006 and August 17, 2007. Your failure to do so was in breach of Law Society Rule 4-43 and Chapter 13, Rule 3 of the *Professional Conduct Handbook*.
23. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to its investigation into matters raised in an interim audit report prepared by the auditor designated to conduct an investigation of your books, records and accounts pursuant to an order made under Law Society Rule 4-43, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to a letter dated December 12, 2006.
24. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of PL's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to a letter dated February 13, 2006.
25. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of RL's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to a letter dated February 22, 2006.
26. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of the Legal Service Society's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated June 29, 2006, August 3, 2006 and August 28, 2006.
27. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of RK's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to a letter dated August 1, 2006.
28. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of DJ's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated August 28, 2006, September 25, 2006, October 17, 2006 and December 12, 2006.
29. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of TT's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated September 26, 2006 and December 14, 2006.
30. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of AG's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated September 28, 2006, November 22, 2006 and December 12, 2006.
31. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of DAR's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated September 28,

2006 and December 12, 2006.

32. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of SB's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated October 11, 2006, November 22, 2006 and December 12, 2006.

33. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of KSD's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated November 23, 2006, December 14, 2006 and January 2, 2007.

34. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation into your conduct in providing a solicitor's undertaking while suspended from the practice of law, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated November 23, 2006 and December 14, 2006.

35. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of TK's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated November 30, 2006, January 4, 2007 and January 24, 2007.

36. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of LZ's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to letters dated December 12, 2006, January 4, 2007 and January 24, 2007.

37. You failed to reply to communications from the Professional Conduct Department of the Law Society in relation to their investigation of TN's complaint against you, contrary to Chapter 13, Rule 3, of the *Professional Conduct Handbook*. In particular, you failed to reply to a letter dated December 13, 2006.

The Agreed Statement of Facts

[4] Two Agreed Statements of Facts were entered as exhibits in the proceedings (Exhibits 4 and 5). Together, they contain admissions by the Respondent as to the facts set out or referred to in the following paragraphs of the citation:

- (a) paragraphs 1 to 6, inclusive;
- (b) paragraphs 9 and 10;
- (c) paragraphs 12 to 21, inclusive,

and, in addition, admissions that, in each case, the facts so admitted constituted professional misconduct.

[5] The Respondent has made no admission of or in respect of the allegation set out in paragraph 7 of the citation. That allegation is stated as an alternative to that in paragraph 6, however, and as noted the latter allegation has been admitted. The Law Society has accordingly withdrawn the allegation in paragraph 7. It has also withdrawn the allegations contained in paragraphs 8, 11 and 22 to 37, inclusive, of the citation and

so we make no findings in respect of those allegations.

The Burden and Standard of Proof

[6] It is trite to say that the onus of proof is on the Law Society. It is now established that the evidence adduced must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at paragraph [46]. See also, *Law Society of BC v. Schauble*, 2009 LSBC 11 at paragraph [43].

[7] Based on the Respondent's admissions in the Agreed Statements of Facts, we have no hesitation in concluding that the Law Society has discharged the onus of establishing, to the requisite standard, that:

- (a) as alleged in paragraphs 2, 4, 5, 6, 9, 12 and 13 of the citation, the Respondent misappropriated client funds by improperly withdrawing those funds for purposes other than which he was entitled to;
- (b) in two instances, as alleged in paragraphs 1 and 3 of the citation, by failing to hold in trust certain funds that had been provided to him on undertakings to do so, the Respondent breached those undertakings and misapplied the funds provided to him;
- (c) in one case, as alleged in paragraph 10 of the citation, the Respondent misled a client as to the status of certain litigation that he had commenced on her behalf;
- (d) as alleged in paragraph 14 of the citation, the Respondent misled the Law Society by stating that he had paid the account of another lawyer whose account he had agreed to pay when in fact he had not done so;
- (e) as alleged in paragraphs 15 to 21, inclusive, of the citation, the Respondent breached a variety of rules of the Law Society relating to the keeping of proper trust accounting records.

Characterization of Conduct and Acceptance of Admissions

[8] It is our view that in each of the matters particularized in paragraph [7] (a) to (d) above the Respondent's conduct reflected " a marked departure from the standard of conduct the Law Society expects of its members" (*Law Society of BC v. Martin*, 2005 LSBC 16, at paragraph [171]) and hence is properly to be characterized as professional misconduct, and we so find. In the circumstances, we have no hesitation in concluding that his admissions of professional misconduct in respect of these matters are appropriate, and we accept them.

[9] The Respondent has also made an admission of professional misconduct [Exhibit 5, paragraph 63] in respect of the matters referred to in paragraph [7] (e) above. Counsel for the Law Society advised us, however, that notwithstanding this admission, the Law Society seeks only the " lesser" verdict that the Respondent committed the breaches of the Society's trust accounting rules in the respects identified, rather than a finding of professional misconduct. We accept the Law Society's position in this respect.

Confidentiality and Solicitor-Client Privilege

[10] At the conclusion of the hearing on May 12, 2009, counsel for the Law Society invited us to consider exercising the power given to us by Rule 5-6(2) of the Law Society Rules to make an order prohibiting the disclosure of certain evidence contained in the Agreed Statements of Facts either on the ground that it is subject to solicitor-client privilege or to a duty of confidentiality owed by the Respondent to clients who were not complainants in these proceedings and who have not waived privilege. We have decided, for the

reasons that follow, to order that:

(a) disclosure of the following is prohibited:

- (i) the entries in Attachment 1 to Exhibit 4 bearing the dates May 15, 2002; May 16, 2002; June 4, 2002; July 2, 2002; November 18, 2002; May 13, 2003;
- (ii) Attachment 10 to Exhibit 4, in its entirety;
- (iii) Attachment 11 to Exhibit 4, in its entirety; and
- (iv) Attachment 13 to Exhibit 4, in its entirety;

(b) Exhibit 4, in its entirety, is to be sealed; and

(c) a copy is to be made of Exhibit 4, redacted to delete:

- (i) the entries in Attachment 1 identified in paragraph (a) (i) above;
- (ii) Attachment 10 in its entirety;
- (iii) Attachment 11 in its entirety; and
- (iv) Attachment 13 in its entirety; and

(d) Exhibit 4, redacted as provided in clause (c) above, is to be entered as Exhibit 6 in these proceedings.

[11] Attachment 1 to Exhibit 4 was prepared by an investigator employed by the Law Society as part of an investigation of the Respondent's books and records ordered under Rule 4-43 of the Law Society Rules. It is a reconstruction, for certain periods, of transactions into and out of the Respondent's pooled trust account and contains information relevant to Allegations 1 and 2 of the citation. That information includes the names of clients for whose benefit payments out of trust were made. It also contains information about the receipt and disbursement of funds in connection with an entirely unrelated transaction involving one of those clients. These clients have neither filed complaints against the Respondent nor made claims against him under the Trust Protection Coverage Program provided through Part B of his compulsory professional liability insurance policy.

[12] It is not necessary for us to decide whether any of the information contained in Attachment 1 that relates to any of these clients or transactions is privileged. It is sufficient, in our view, that the Respondent is subject to a professional obligation to keep this information confidential, and there is no evidence that the clients have done anything that could reasonably be considered to release him from the obligation. They have an interest, therefore, that calls for protection and, by reason of the provisions of section 88 (2) and (3) of the *Legal Profession Act*, the obligation to ensure that protection is extended to all who, in the course of carrying out their duties under the *Act*, acquire protected information. Rule 5-6(2) allows us, by making appropriate orders, to ensure that protection, and that is what we have done.

[13] We have prohibited disclosure and ordered the deletion of the information contained in Attachments 10 and 13 for a similar reason, namely, that they contain information with respect to clients to whom the Respondent owes a duty of confidentiality from which he has not been released, and they are accordingly entitled to have their confidential information protected.

[14] Finally, we have prohibited disclosure and ordered the deletion of the document contained in Attachment 11 on the ground that it is a communication between the Respondent and his client that is subject to a solicitor and client privilege that has not been waived by the client.