2009 LSBC 32
Report issued: October 23, 2009
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Gerhard Ernst Schauble

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: October 2, 2009

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] The decision on Facts and Verdict was issued on April 16, 2009 following four days of hearing. There was a finding of professional misconduct arising from misappropriation of funds of a law firm.

[2] Specifically, the Panel found that the Respondent was not entitled to keep the fees from the files for himself rather than split them with the firm, and that he did not honestly believe he was entitled to do so. The Panel found, rather, that the Respondent knowingly and intentionally misappropriated the funds.

[3] The Respondent was called to the bar of British Columbia in 1989.

[4] The Respondent has no prior Professional Conduct Record.

[5] The Respondent provided 65 letters of reference.

[6] The Respondent called Michael Dirk as a witness at the Penalty hearing. Mr. Dirk testified both as to the good reputation of the Respondent and to the bad faith of the other partner in the firm, Salloum, in breaching the agreement with the Respondent.

[7] The Respondent testified at the Penalty hearing. He said that there had been a marked decrease in his gross income for his current fiscal year and in light of his debt load a suspension might force him to close his practice.

[8] Under cross-examination, the Respondent was asked what he would have done differently. He responded that his biggest mistake was entering a professional association agreement with Salloum. He added that his second biggest mistake was in not leaving the relationship when he had an earlier opportunity. He did not acknowledge that he should have handled the within situation differently.

Submissions

[9] Counsel for the Law Society submitted that the appropriate penalty would be a suspension in the range of six to nine months and costs in an amount of $32,000.

[10] A number of cases were cited by counsel for the Law Society; some of which deal with the misappropriation of firm funds. These cases range from a reprimand and fine to disbarment. These cases were: *Law Society of BC v. Eisbrenner*, [2003] LSBC 03; *Law Society of BC v. Hainer*, 2007 LSBC 14; *Law Society of BC v. Morrison*, [1997] LSDD No. 193; *Law Society of Upper Canada v. Sagel*, [1995] LSDD No. 190; *Law Society of Upper Canada v. Kerbel*, [1996] LSDD No. 47; *Law Society of Upper Canada v. Porter*, [1997] LSDD No. 168; *Law Society of Manitoba v. Fisher*, [1998] LSDD No. 67; *Law Society of Upper Canada v. Frishette*, [2005] LSDD No. 17.

[11] Counsel for the Respondent submitted that the appropriate penalty would be a fine and costs in an aggregate not in excess of $12,000.

[12] Counsel for the Respondent cited a number of cases, of which some deal with the misappropriation of firm funds and some with other types of dishonesty with associates. The cases that deal specifically with misappropriation were: *Law Society of BC v. Morrison*, [1997] LSDD No. 193; *Law Society of Manitoba v. Taylor*, Discipline Committee case 09-06 (December 18 2008); *Law Society of Upper Canada v. Benaiah*, 1993 CanLII 695 (Ont. LSDC).

[13] Counsel for the Respondent also referred the Panel to the decision of *R. v. McFarlane*, [1976] 3 Alta. LR (2d) 341 and submitted that the actions of the Respondent were " close to the line" and that the misconduct was of a technical nature. The Panel expressly rejects that position, having specifically found in paragraph [61] of the Verdict that the Respondent " did not honestly believe he was entitled to do so [keep the fees]" .

[14] In the alternative, counsel for the Respondent submitted, in reference to the *Ogilvie* factor of the number of times the offending conduct occurred, that this " conduct was out of character for Mr. Schauble and was an unfortunate over-reaction to provocative misconduct by Salloum" .

Analysis and Discussion

[15] *Law Society of BC v. Ogilvie,* [1999] LSBC 17, sets out a non-exhaustive list of factors that may be considered by a Panel on penalty.

[16] The Panel's analysis of the factors affecting penalty is based on a review of the factors set out in the *Ogilvie* decision cited above.

[17] Considering (a), " the nature and gravity of the conduct" , misappropriation of funds is a very serious breach. *Bolton v. Law Society,* [1994] 2 All ER 486 (CA) at 491 says:

> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. ... The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors

[18] Considering (b), " the age and experience of the respondent" , Mr. Schauble is and was an experienced member of the profession having been called to the bar in Alberta in 1981 and in British Columbia in 1989.

He certainly had sufficient experience to realize that what he did was wrong.

[19] Considering (c), " the previous character of the respondent" , there is no prior Professional Conduct Record. The glowing character references provided by the Respondent are relevant to this *Ogilvie* factor. It should be noted that only one of the letters refers to any awareness of the Respondent's misconduct. As indicated in *Law Society of BC v. Hordal*, 2004 LSBC 36 in paragraph [69], " It is however improper to confuse popularity with probity."

[20] Considering (d), " the impact of the behaviour on the victim" , if undetected, the misappropriation would have cost the firm approximately $45,000 in revenue. The dispute between the Respondent and the firm was eventually resolved by litigation.

[21] Considering (e), " the advantage gained or to be gained, by the respondent" , Mr. Schauble said that he had only gained the tactical advantage of forcing Salloum to engage in an accounting as part of the litigation. However, the Panel finds that it was not a certainty that these funds would ever have been accounted for as firm income. If the Respondent really wanted an accounting, he should have put the funds in a trust account and advised the firm that he was not authorizing the transfer to the general account until a full accounting was done.

[22] Considering (f), " the number of times the offending conduct occurred" , there were the three accounts diverted from two intertwined and one separate file.

[23] Considering (g), " whether the respondent has acknowledged the misconduct" , the Panel concludes from the Respondent's answers in cross-examination that he does not acknowledge any misconduct. Regret for the problems caused by decisions is not remorse.

[24] Considering (h), " the possibility of remediating or rehabilitating the respondent" , the Panel accepts the Respondent's submission that this discipline process has been so upsetting that there is no likelihood of repetition.

[25] Considering (i), " the impact on the respondent of criminal or other sanctions" , there have been none.

[26] Considering (j), " the impact of the proposed penalty on the respondent" , the Panel accepts the Respondent's submission that a suspension and costs will have a serious impact on the Respondent's practice. However, in light of the strong reputation of the Respondent in his community, the Panel does not believe that a suspension would jeopardize the viability of that practice.

[27] The Panel considers (k), " the need for specific and general deterrence" and (l) " the need to ensure the public's confidence in the integrity of the profession" to be intermingled in this particular case. On the facts of this case, the Panel believes that a period of suspension is appropriate.

[28] Considering (m), " the range of penalties imposed in similar cases" , the authorities cited by counsel for the Law Society and for the Respondent reveal a range from a substantial fine to a lengthy suspension. Misappropriation of funds from a firm has been held to be slightly less serious than misappropriation of a client's funds. It is, however, a serious breach of trust. *Law Society of Upper Canada v. Kerbel, supra,* states:

> However, while most of the matters here involved internal dealings between the Solicitor and his employer, the Committee is mindful that law firms are founded in trust. A lawyer has a fiduciary obligation to his firm. What we are dealing with in this case is an improper accounting of funds to his firm which funds the Solicitor personally received and retained. It is of little consequence that the Solicitor felt entitled to the money. ...

> A lengthy suspension is required not only because the facts demand it, but also to signal to the profession that the Law Society will deal harshly with Solicitors who betray the trust of their associates.

[29] The Panel is satisfied that a period of suspension is the appropriate penalty. While the range of penalty submitted by counsel for the Law Society would generally be appropriate, the Panel also considered the Respondent's belief that he had been provoked by Mr. Salloum's actions. However, two wrongs do not make a right, nor do they justify professional misconduct. While provocation does not justify the Respondent's actions, it does mitigate the penalty.

Decision

[30] After consideration, the Panel finds that the appropriate disposition of this matter is a suspension of three months.

Costs

[31] The Law Society entered as an exhibit a Bill of Costs in the amount of $75,335.80. The Law Society is seeking costs in the amount of $32,000 reflecting a reduction of approximately 30% of counsel fees, plus disbursements.

[32] The Panel adopts the factors in determining costs laid out in *Law Society of BC v. Racette,* 2006 LSBC 29. These are: the seriousness of the offence; the financial circumstances of the Respondent; the total effect of the penalty, including possible fines and/or suspensions; and the extent to which the conduct of each of the parties has resulted in costs accumulating.

[33] Having carefully considered each of those factors in the within matter, the Panel finds that costs should be fixed in the amount of $32,000.

Penalty

[34] This Panel makes the following order:

1. The Respondent is suspended for three months, commencing December 1, 2009.

2. The Respondent must pay a contribution to the costs of these proceedings in the amount of $32,000 within one year from the expiration of the suspension.