

2011 LSBC 27

Report issued: September 7, 2011

Citation issued: August 10, 2010

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

Hearing date: June 27, 2011

Panel: David Renwick, QC, Chair, Nancy Merrill, David Mossop, QC

Counsel for the Law Society: Gerald Cuttler

Appearing on his own behalf: Gerhard Schauble

Background

[1] A citation was issued against the Respondent on August 10, 2010. The Respondent has admitted that he was served with the citation. The Respondent retired from the practice of law in April, 2011.

[2] The Schedule to the citation (amended prior to the hearing) sets out the nature of the conduct to be inquired into:

1. In the course of jointly representing your clients KG and ER in the sale of real property in or about September 2005, you received net sale proceeds of approximately \$451,390.31 on their behalf, but failed to provide an account in writing to KG of the disbursement of all of those funds, contrary to Rule 3-48 of the Law Society Rules.
2. In 2005, in the course of jointly representing your clients KG and ER in the sale of real property:
 - (a) you did not advise each client that no information received from one of them as part of the joint representation could be treated as confidential as between them, contrary to Chapter 6, Rule 4 of the *Professional Conduct Handbook*, and/or
 - (b) without obtaining the informed consent of KG, you purported to assist them as a mediator to resolve a conflict that had arisen between them, contrary to Chapter 6, Rule 5 of the *Professional Conduct Handbook*.
3. You acted as a mediator in a family law mediation between KG and ER regarding the division of proceeds received from the sale of real property, contrary to Chapter 6, Rule 9 and Appendix 2 of the *Professional Conduct Handbook*, when you had previously acted for both of them in a solicitor-client relationship with respect to the subject matter of that mediation, in circumstances where:
 - (a) you knew that the dispute between them was a family law mediation matter, or
 - (b) you failed to make adequate inquiry to determine whether the dispute between them was

a family law mediation.

4. In 2005 in the course of representing your clients KG and ER in the sale of real property owned by them, you also acted as a mediator in respect of a dispute between them regarding the division of the sale proceeds, in circumstances in which a person might reasonably find it difficult to determine whether you were acting as a lawyer or a mediator, contrary to Chapter 7, Rule 6 of the *Professional Conduct Handbook*.

5. In or about 2005, in the course of representing your clients KG and ER in the sale of real property and/or during a mediation between them regarding the division of the sale proceeds, you:

(a) preferred the interests of ER by entering into an agreement with him to reduce the fees payable by him pursuant to the “Retainer Agreement for Negotiation of Property Dispute” dated September 28, 2005, and/or

(b) agreed to keep confidential the terms of your agreement with ER, contrary to:

(i) your obligation to disclose all material information to your client KG pursuant to Chapter 3, Rule 3 of the *Professional Conduct Handbook*, and/or

(ii) paragraphs 7 and 9 of the Retainer Agreement for Negotiation of Property Dispute.

[3] This matter comes before the Panel by way of a conditional admission of a disciplinary violation and consent to disciplinary action that has been accepted by the Discipline Committee under Rule 4-22.

Agreed Statement of Facts

[4] The evidence is set out in the Agreed Statement of Facts. The essential elements follow.

1. The Respondent opened a conveyancing file for KG and ER (the “clients”) on August 19, 2005 regarding the sale of their jointly owned property in Peachland, British Columbia.

2. On August 24, 2005 the Respondent received faxed instructions dated August 5, 2005 signed by KG and ER to divide the sale proceeds equally between them and to issue separate cheques in that regard. Therefore the Respondent drafted an Order to Pay to be signed by the clients, irrevocably instructing the Respondent’s law firm to divide the estimated net sale proceeds equally between the clients.

3. The Respondent’s first meeting with the clients was on September 23, 2005. Prior to this meeting the Respondent was not aware that there was any dispute between the clients as to the division of the net sale proceeds. During this meeting the Respondent was advised that division of the net sale proceeds was in dispute as ER required more than one-half of the net sale proceeds. Consequently the Respondent amended the Order to Pay by crossing out the instructions that the funds were to be “picked up” and inserting in their place “paid subject to payment of outstanding taxes, accounting and legal fees, and upon agreement between the parties as to the outstanding issues or pursuant to Court Order.” The clients then executed the amended Order to Pay.

4. The Respondent was now aware that a conflict had arisen between the clients.

5. On or before September 28, 2005 the Respondent drafted and provided to the clients a “Retainer Agreement for Negotiation of Property Dispute” that included a copy of section 78 of the Legal Profession Act (the “Retainer Agreement”). The clients executed the Retainer Agreement on September 28, 2005.

6. The Respondent maintains that, before the Retainer Agreement was executed, he was of the view that the dispute between the clients was a commercial dispute and therefore made no inquiries as to whether mediating the dispute between them would constitute a family law mediation as defined in Chapter 6, Rule 9 and Appendix 2 of the *Professional Conduct Handbook*, thereby disqualifying the Respondent from acting as mediator. He believed that, although the clients were living together, they were not married. ER had a wife in Europe, and the mediation involved the sale proceeds from the property, the appliances and household furniture, but no other issues.

7. The Retainer Agreement contained provisions regarding the selection and neutrality of the mediator, withdrawing from negotiations and the requirement of full disclosure by the clients and stipulated that the mediator may disclose all information provided by one client to the other client and that the mediator's fee is ten percent of the amount negotiated.

8. The sale completed on September 30, 2005, and the Respondent received the sale proceeds in the amount of \$451,390.31 in trust. On that same day KG executed an Order to Pay that provided that the net proceeds of sale, being \$245,214.90 after expenses, including the Respondent's account of \$1,500.01 but not including the hold-back amount that would be held pending clearance certificates, would be divided equally between ER and KG, being \$122,607.45 each. The Order to Pay further provided that:

HOLDBACK AMOUNT to be paid as follows once clearance certificates received:

Meyers Norris Penny [the "accountant"]-accounting fees

The Millennia Law Corporation-legal fees

Receiver General of Canada-outstanding taxes

and the balance to be divided and paid equally to ER and KG.

9. On October 4, 2005 the Respondent rendered an account in the amount of \$1,500.01 for the sale of the clients' property and paid himself from the proceeds held in trust. At approximately the same time steps were taken to obtain a clearance certificate in respect of ER's portion of the sale proceeds. The accountant advised that a clearance certificate was not required for KG's portion of the sale proceeds as she had a Canadian permanent resident card. The Respondent did not advise KG that a clearance certificate was not required for her share of the sale proceeds nor did he provide her with any documents relating to the steps taken to obtain ER's clearance certificate.

10. On October 7, 2005 ER executed an Order to Pay in a form identical to that executed by KG on September 30, 2005.

11. On October 11, 2005 the Respondent deposited the sum of \$122,607.45 to KG's bank account. On or about the same day he provided the sum of \$122,607.45 to ER. The Respondent retained the amount of \$204,675.40 in his trust account.

12. On October 25, 2005 the Respondent received a handwritten letter from KG demanding the sum of \$3,131.18 from ER, asking that it be taken into account when paying out the remaining funds. The Respondent wrote back to KG advising that the balance of trust funds would be dispersed in accordance with the Order to Pay dated September 30, 2005 and that her request for additional funds could not be accommodated as he was bound by the Order to Pay.

13. On October 26, 2005 the Respondent rendered his account for mediation services to KG in the amount of \$25,729.25 inclusive of taxes. The Statement of Account referred to "all things incidental to

the successful negotiation of the division of sale proceeds of sale pursuant to the Retainer Agreement dated September 28, 2005.” The Respondent paid this account from the balance of the sale proceeds that he continued to hold in his trust account. He deposited the sum of \$76,608.45 into KG’s bank account and sent her a receipt for that deposit along with a copy of the Order to Pay dated September 23, 2005 and a copy of his statement of account for \$25,729.25, which he had paid from trust.

14. On November 17, 2005 the Respondent paid the accountant the sum of \$5,843.21 for ER’s withholding tax, as well as the accountant’s fees. That same day he met with ER and provided him with an account for his mediation services in the amount of \$2,871.08 inclusive of taxes, which was subsequently paid from the Respondent’s trust account. Ultimately ER received the balance of the sale proceeds held in the Respondent’s trust account.

15. On October 11, 2006 an Appointment to review the Respondent’s account was filed on behalf of KG. A complaint about the Respondent had been made on behalf of KG to the Law Society in July, 2006. The Respondent was notified of KG’s complaint.

16. On November 19, 2009 the Respondent sent a without prejudice letter to KG advising her that a clerical error was made in calculating her account and offered to settle his account by refunding the sum of \$15,380.67. The Respondent then refunded the sum of \$15,380.67 to KG, which funds she received on November 30, 2009. On June 16, 2010, the Respondent further reduced his fees to \$2,500 plus HST. The assessment of his account was discontinued, and he reimbursed KG a further sum of \$8,866.49.

ADMISSIONS OF PROFESSIONAL MISCONDUCT

[5] The Respondent conditionally admits that he professionally misconducted himself as follows:

(a) In the course of jointly representing his clients KG and ER in the sale of real property in or about September, 2005, the Respondent received net sale proceeds of approximately \$451,390.31 on their behalf, but failed to provide an accurate account in writing to KG of the disbursement of those funds to her, in that he failed to disclose that he had reduced the amount of legal fees payable by ER, contrary to Rule 3-48 of the Law Society Rules;

(b) In 2005, in the course of the Respondent jointly representing his clients KG and ER in the sale of real property:

(i) he did not advise each client that no information received from one of them as part of the joint representation could be treated as confidential as between them, contrary to Chapter 6, Rule 4 of the *Professional Conduct Handbook*, and

(ii) he purported to assist them as a mediator to resolve a conflict that had arisen between them without obtaining the informed consent of KG, contrary to Chapter 6, Rule 5 of the *Professional Conduct Handbook*.

(c) The Respondent acted as a mediator in a family law mediation between KG and ER regarding the division of the proceeds received from the sale of real property, in circumstances where the Respondent failed to make adequate inquiry to determine whether the dispute between them was a family law mediation, when he: (1) had previously acted for both of them in a solicitor-client relationship; (2) knew they were cohabitating at the time of the sale of the Property; (3) previously received instructions that there was to be an equal division of the sale proceeds from the Property; and (4) then became aware that the equal division of the sale proceeds had become an issue,

contrary to Chapter 6, Rule 9 and Appendix 2 of the *Professional Conduct Handbook*;

(d) In 2005, the Respondent, in the course of representing his clients KG and ER in the sale of real property owned by them, acted as a mediator in respect of a dispute between them regarding the division of the sale proceeds, in circumstances in which a person might reasonably find it difficult to determine whether he was acting as a lawyer or a mediator, contrary to Chapter 7, Rule 6 of the *Professional Conduct Handbook*;

(e) In 2005, the Respondent, in the course of representing his clients KG and ER in the sale of real property and/or during mediation between them regarding the division of the sale proceeds, the Respondent:

(i) preferred the interests of ER by entering into an agreement with him to reduce the fees payable to him pursuant to the “Retainer Agreement for Negotiation of Property Dispute” dated September 28, 2005, and

(ii) agreed to keep confidential the terms of his fee agreement with ER, contrary to his obligation to disclose all material information to his client, KG, pursuant to Chapter 3, Rule 3 of the *Professional Conduct Handbook*.

[6] The Panel accepts the Respondent’s conditional admission and determines that the Respondent has committed professional misconduct.

[7] Counsel for the Law Society and the Respondent have jointly submitted that the appropriate disciplinary action is a four month suspension to be served at such time that the Respondent becomes a practising lawyer in accordance with the *Legal Profession Act* and the Law Society Rules and that he pay costs in the amount of \$10,000, to be paid on or before August 1, 2012. The Discipline Committee accepted this outcome and recommends it to the Panel.

[8] The Respondent was previously cited for knowingly or intentionally misappropriating funds. On October 2, 2009 the panel hearing that citation ordered that the Respondent be suspended for three months commencing December 1, 2009 and pay costs in the amount of \$32,000.

[9] The mitigating factor in this case is that the Respondent repaid money to the complainant, KG.

[10] The proposed four month suspension is a lengthier suspension, in keeping with the principles of progressive discipline.

[11] As the Respondent is now retired, any suspension imposed would be effective upon his return to the practice of law in British Columbia.

ORDER

[12] The Panel accepts the proposed disciplinary action and orders that the Respondent:

(a) be suspended for four months, to be served at such time as he becomes a practising lawyer in accordance with the *Legal Profession Act* and the Law Society Rules; and

(b) pay costs to the Law Society in the amount of \$10,000, payable on or before August 1, 2012.