2014 LSBC 14
Report issued: March 14, 2014
Citation issued: August 25, 2011

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

Peter Krogh Jensen

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing dates: September 9, 10, 11 and 12, 2013, October 23, 2013 and December 4, 2013
Panel: Kenneth Walker, QC, Chair, John Hogg, QC, Lawyer, Thelma Siglos, Public representative

Counsel for the Law Society: Mark Skwarok and Cody Mann, Articled Student
Counsel for the Respondent: Penny Green

introduction

[1] In years past it was uncommon for individuals to represent themselves in legal matters in Court or otherwise. There are more and more individuals choosing to self-represent in the Courts. In the past, it was common to say that such individuals were “unrepresented”. Today such individuals are referred to as “self-represented”.

[2] It is not just the Courts that need to take extra precaution with individuals not represented by a lawyer.

[3] Lawyers have professional responsibilities when individuals are not represented by a lawyer.

[4] Chapter 4, Rule 1 of the *Professional Conduct Handbook*, which was in effect at the time relevant to this matter, gave guidance to a lawyer representing a client in a matter when a self-represented person becomes involved. That section of the *Handbook* read:

> ### Dealing with unrepresented persons
>
> 1. A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter’s interest are not being protected by the lawyer.

[5] These reasons explore how lawyers should conduct themselves with persons not represented by a lawyer.

[6] The issues before the panel arise from a complaint by BF (spouse of DF) who complained to the Law Society in March, 2010. She complained that she tendered a $200,000 US bank draft to the law firm Devlin Jensen to purchase shares of C Inc. from JN or from a related company. JN was a client of Peter Jensen. BF was self-represented (i.e., not represented by counsel).

ISSUES

1. Was the Respondent required to provide the caution contained in Chapter 4, Rule 1 of the *Professional*

Conduct Handbook in the circumstances surrounding the payment of $200,000 US to his firm?

2. If the Respondent was required to provide the caution and failed to do so, did that breach amount to professional misconduct?

ORDER REGARDING CLOSING THE HEARING AND NON-DISCLOSURE

[7] During the hearing we were asked to grant an order closing the hearing. We were also asked to grant an order preventing distribution of exhibits and transcripts of the evidence of this hearing. On September 12, 2013 we gave oral reasons ordering that the hearing remain open to the public and not be closed. We also ordered that the exhibits filed and transcripts of the proceeding not be available to anyone except the Law Society of British Columbia and the Respondent.

[8] These are written reasons for those orders. We found there were no exceptional circumstances that existed in this hearing requiring a closed hearing. Law Society hearings should be open to the public, and this hearing is not any different. There is a presumption of open and transparent hearings to maintain public confidence in the disciplinary process.

[9] We ordered non-production of the exhibits and transcript because we were advised that a civil action involving the parties has been commenced. The evidence at this hearing should not be used for a different proceeding. That proceeding has its own processes for discovery of documents and oral examinations for discovery.

[10] On December 4, 2013 Ms. Green, on behalf of the Respondent, applied for three decisions:

(a) An enforcement order relating to the earlier non-production order;

(b) An order quashing the citation pursuant to s. 7 and s. 11 of the *Charter of Rights* and on the principle of unfairness;

(c) in the alternative, that:

1. The use of the JN affidavit by DF and BF in the civil proceedings be considered an adverse factor when determining credibility of DF and BF; and

2. An order that Law Society counsel withdraw the submission that an adverse inference be drawn against the Respondent for failure to produce JN at the hearing.

[11] We gave oral reasons for the dismissing all three applications. These are the written reasons.

[12] The enforcement order sought is not within the jurisdiction of a hearing panel. We discussed with counsel the provisions of the Legal Profession Act relating to enforcement, and counsel agreed that, although the Law Society as an institution may have jurisdiction to enforce orders, we, as a Panel, do not have such jurisdiction.

[13] We dismiss the application to quash the citation. The affidavit of JN was used in civil proceedings by BF and DF. The affidavit was never marked as an exhibit at this hearing (it is now attached to the affidavit of the Respondent sworn November 29, 2013 and marked as Exhibit A to this application). We have not read the affidavit of JN.

[14] We find that s. 7 and s. 11 of the *Charter* do not apply. As the hearing panel in *Re: Lawyer 11*, 2007 LSBC 49, found, section 11 of the *Charter* is not engaged by disciplinary proceedings against a lawyer. There is no evidence that the Respondent has been deprived of “life, liberty and security of the person,” which is one of the components necessary to invoke section 7 of the *Charter*, as determined by the

Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869.

[15] We also find that the affidavit used by BF and DF was not part of the non-production order. We do not comment on its use in another proceeding. We find that the Law Society has not been unfair in the use it has made of the affidavit in preparing its case. We find no unfairness and dismiss the application to quash the citation.

[16] With respect to the use of the affidavit as an adverse factor in assessing the credibility of DF and BF, there was no application to re-open the evidence by the Respondent. That affidavit evidence is not before us and will not be used for the purpose of impugning credibility. Counsel for both the Law Society and the Respondent have put before us a body of documentary and oral testimony that we are required to consider.

[17] We cannot order that the Law Society withdraw its submission that an "adverse inference" be drawn for failure to call JN as witness. The affidavit is not evidence before us and will not be considered. We have no control over the submissions of counsel other than to remind counsel that an overriding principle in this proceeding is fairness.

BACKGROUND

[18] In mid-2007 DF and BF, who are spouses, moved to Vancouver. DF was a founder in a company called S Inc. Mr. Jensen was the company lawyer for S Inc. and introduced JN to S Inc. JN became a significant lender for S Inc. BF joined DF in Vancouver. She sold her home in the Interior and invested in both S Inc. and C Inc., which becomes central to this disciplinary matter. DF was not a sophisticated investor but became somewhat knowledgeable about junior investments through his involvement with S Inc., and G Packaging and other junior investment companies. BF was a novice, unsophisticated investor.

[19] Sometime prior to September 26, 2008, JN asked if DF or his family was interested in C Inc. shares. C Inc. was a company being traded on the stock market for about $1.00 per share. The company purpose was to recycle tires in Europe. It was attractive, "green" and had at least one plant in operation. DF thought about the money from the sale of the house in BF's account. This money was BF's. DF introduced BF to this potential investment. Then DF and BF met JN for a lunch meeting at Earl's. JN offered to sell 400,000 shares C Inc. for $200,000 US. This offer was 50 cents per share when the shares were trading at $1.00. These free trading shares were to be delivered within a week.

[20] Mr. Jensen was a lawyer with known integrity. BF was to provide a cheque to Devlin Jensen, Mr. Jensen's firm, for $200,000 US. BF was to set up a trading account at a bank and then provide the account information to JN's secretary. The shares would be transferred by M Capital (or by JN) to BF's investment account. BF expected to be able to sell the shares for a 100 per cent profit. BF testified that she expected to sell the shares immediately. (In other words, she expected to have a $200,000 profit within one week.) BF was excited to purchase C Inc. shares at this price. DF had encouraged the $200,000 US investment because the company was good; JN was a "stand-up guy" and the offer to sell free trading shares at 50 cents when trading at $1.00 was a terrific opportunity. BF testified she knew that Mr. Jensen was the lawyer for C Inc. and this also factored into her decision to invest.

[21] JN's motivation to sell shares at half price was explained by BF. BF testified that JN stated that C Inc. would benefit by having small investors like BF. This would create investor confidence. BF also thought that JN was being kind to her because he wished her to continue to be friends with his girlfriend. She also thought that, because JN was so rich, this kind of sale/purchase was just not important to him in a monetary sense. BF was motivated to buy because of the "green" nature of this company.

[22] We find that her primary motivation was “profit”. It was clear she would sell the shares immediately to secure a $200,000 profit. BF testified she relied on her husband’s opinion on this investment. BF also testified that she did not know if the investment was “risky”. We find BF relied on her husband’s general but naïve knowledge relating to this investment.

[23] During lunch at Earls JN wrote instructions on how to prepare a bank draft in favour of M Capital as payee. After lunch BF and DF went to the bank to draw a bank draft in this form: payee “M Capital ITF (… in trust for ….) Devlin/Jensen”. JN agreed that if the cheque was delivered to Devlin Jensen that day, 400,000 C Inc. free trading shares would be delivered within one week.

[24] BF and DF arrived at the Devlin Jensen office without an appointment on September 26, 2008. Mr. Jensen agreed to meet them for a few minutes near the reception area. The conversation was long enough to realize that the draft payable to M Capital could not be put into the trust account at the law firm. If the law firm was to be the vehicle for the purchase of shares the draft needed to indicate “Devlin/Jensen in Trust”.

[25] BF testified that Mr. Jensen never gave her any business advice or legal advice during this short meeting. BF never considered Mr. Jensen to be “her” lawyer. (As an example, “I am not claiming that Mr. Jensen was my lawyer.” Exhibit 4, tab 3, letter of May 27, 2010; fourth paragraph). She has also been insistent that the agreement for purchase of the shares was between her and JN. She did testify that Peter Jensen did not advise her to get advice from someone else relating to the investment. BF testified that Mr. Jensen did not tell her to get independent legal advice or do research. BF testified she “assumed” the words “in trust” meant the money remained in trust until the shares were delivered.

> Q Were you told – sorry, did you tell Mr. Jensen that you expected
>
> him to hold the money until you received the shares?
>
> A I don't know that I actually said it. I just assumed that’s what in trust, the trust account was for.
>
> Q Okay. Well, let’s explore that a bit. Both of the drafts that you prepared had the phrase “in trust”?
>
> A Yes.
>
> Q And you were the one that instructed that phrase to be put in the draft?
>
> A Yes.
>
> Q What did you understand those words meant?
>
> A Trust fund, like the money just sits there until he’s instructed by me to use it.

[26] Mr. Jensen’s recollection of this short conversation is slightly different. He testified that DF and BF attended without appointment and they described the general nature of the transaction. Mr. Jensen testified that he pointed out that the draft was in the wrong form, that he could not deposit the draft with M Capital as payee. He testified that he advised them: 1) Do the deal directly with JN; or 2) Think about it and not do the deal; or 3) If they changed the draft to Devlin Jensen in trust he could take the cheque in trust for M Capital. Mr. Jensen testified DF and BF really wanted him to help them, as a favour, because they were friends. Mr. Jensen testified he could not remember the exact words of this short conversation. We find that both parties have tried to reconstruct this conversation honestly. Mr. Jensen agreed he did not directly caution DF and BF about independent legal advice or that he was not protecting their interests.

> Q Okay. And did you tell them to get independent legal advice?
>
> A Not in those words, no.

> Q Well, did you suggest that they should speak to a lawyer about doing this?
>
> A I thought that that was fully understood.

And later,

> Q And did you give them any advice expressly or -- well, start off expressly that you were not going to represent their interests in any share acquisition?
>
> A Not expressly, no.
>
> Q Okay. Did you say words to that effect?
>
> A I believed I was saying words to that effect.
>
> Q Could you please tell the panel exactly the words you used as best you can recall?
>
> A I can't exactly say but they knew the situation, my giving them their option to go away and think about it and basically effect it if they wished on their own risk or recognizance was as I believed sufficient in the circumstances.

[27] Mr. Jensen testified that he thought both DF and BF (through DF) knew he was the lawyer for M Capital (JN). He inferred that, since they knew he acted for M Capital and JN, he did not have to state something already understood. He also stated it was unnecessary to caution as no transaction occurred that day. He did not take the bank draft and thought they may not return. This conversation occurred five years before this hearing.

[28] We find it is impossible to know exactly what the conversation was based on memories of a five minute conversation that old.

[29] DF and BF returned to the bank and a new bank draft was created that day showing Devlin Jensen "in trust" as payee. However, the draft was dropped off on September 29, 2008 at Devlin Jensen with an envelope, without specific instructions. Mr. Jensen was out of the office until October 1, 2008, but on that day he realized the draft had arrived at the office.

[30] Mr. Jensen needed to confirm the instructions concerning the bank draft. On October 1, 2008 he emailed DF (not BF). The email is short and the content is reproduced here:

> I received the bank draft for the $200,000 US for the M Capital account for your purchase of C Inc. shares. Please provide instructions for deposit to the M Capital trust and please confirm purchase price of the C Inc. shares. I can't deposit without that.

[31] We observe that the email by Mr. Jensen provides insight into his general understanding of the agreement. First, Mr. Jensen had received the $200,000 US for the purchase of "your" shares of C Inc. He also knew the draft was from BF and DF but did not know who was buying the shares. Mr. Jensen assumed that, since both BF and DF were together he could get any required instructions from DF. Mr. Jensen did not know the exact details of the transaction, but we find this was information easily obtained from either his client, JN or from the DF and BF. The arrival of $200,000 US at the office for a client brings with its arrival a certain amount of inquiry and diligence. Mr. Jensen's email shows he was concerned, and he needed confirmation that the money was to be deposited into the M Capital account ("I must have that information.")

[32] Also, Mr. Jensen needed to know the purchase price per share. He testified that he expected that JN would confirm the purchase/sale details and that he, Mr. Jensen, would prepare a simple agreement relating to the share purchase of shares. Mr. Jensen intended to prepare a short simple agreement. Such

agreement would contain cautions advising DF and BF that Mr. Jensen acted only for M Capital (JN); that he did not protect their interests; and that they were entitled to and should get independent legal advice. These cautions would have satisfied the requirements of Chapter 4, Rule 1 of the *Professional Conduct Handbook*.

[33] Mr. Jensen regularly drafted subscription agreements. These agreements provided the expected advice of a prudent solicitor. They identified that Devlin Jensen acted only for the company and that the buyers of the shares clearly understand they should get independent legal advice concerning the agreement (purchase). An example of a standard subscription agreement is found at Exhibit 5, tab 2. DF knew about such agreements and in fact had signed such agreements on behalf of S Inc. Such clauses comply with the requirements set out in Chapter 4, Rule 1 of the *Professional Conduct Handbook*.

[34] DF responded to the Mr. Jensen's email in the unfortunately short fashion that seems to be the trend in the instant messaging society of today. DF's response was:

> Hi peter [sic] please put it in M Capital and JN will tell you the rest. Thanks.

[35] The effect of this message confirms that the money was for the M Capital account and, secondly, that Mr. Jensen could get any other information from JN concerning the share transaction. We find the shares were to be transferred to BF and JN had an obligation to transfer the shares, or cause the shares to be issued or transferred, to BF.

[36] The shares were not issued or transferred at any time to BF.

[37] By October or November 2008, BF testified, she sent an email to JN concerning the share transfer. The inquiry was the first of many by BF to JN relating to the transfer or failure to transfer the C Inc. shares. The email was not sent to Mr. Jensen. BF believed that the transaction was between herself and JN.

[38] Mr. Jensen had a role concerning this trust money. He had a duty to caution the self-represented DF and BF. DF and BF were not represented by counsel.

[39] From the fall 2008 through to January 2010, BF and DF regularly socialized with JN and with Mr. Jensen. DF, JN and Mr. Jensen were not only business associates but also friends. There were many investment opportunities between these friends and associates.

[40] In January and February 2009 JN instructed Mr. Jensen to transfer most of the $200,000 US held in trust at Devlin Jensen for M Capital to G Packaging or on behalf of G Packaging. DF and BF, having paid the money to Devlin Jensen in trust for JN or his company, could no longer determine what was to become of it. The law practice was busy, but alarm bells should have been ringing for Mr. Jensen. JN was calling for the money. Mr. Jensen knew that no agreement for the transfer of shares had been prepared. He knew the money came from at least DF, but by looking at the envelope that contained the draft (Exhibit 3, tab 4), Mr. Jensen should have realized BF was the intended owner of the shares. The existence of the envelope would certainly have caused a reasonable lawyer to consider who should be the parties to the share transfer agreement.

[41] The financial viability of S Inc continued to struggle. The relationship between DF and JN deteriorated proportionately. Whether the failure was due to poor product, poor organization, lack of funding, or economic times is not for us to decide. The failing companies however, did result in finger pointing between DF and JN. Each blamed the other for the failure.

[42] Between the fall of 2008 and early 2010, we find that BF tried to get JN to transfer the shares to her account.

[43] In the fall of 2009 DF approached Mr. Jensen to see if he could persuade JN to transfer the shares to BF. Mr. Jensen did this, as a friend, and discovered that JN had new conditions to the transfer, requiring accounting for monies invested in S Inc. by JN. The shares were not transferred.

[44] An email of January 21, 2010 from BF to Mr. Jensen (Exhibit 3, tab 6) showed her continued optimism for C Inc. That email reads:

> I have not received the shares (400,000) for CG Co., which was C Inc., previously. I gave $200,000.00 US Funds to Devlin/Jensen (in trust) in September 2008. I have waited patiently, and I was told to wait until the new company was established. I have been following the progress, it looks good. I have asked DF to talk to JN and to you, and I realize that I need to ask you directly when I can expect to have the shares issued to me. JN reassured me that I would be receiving the free trading shares to be deposited in my [bank] investor line. Peter, could you please look into this matter for me.

[45] However by March things had changed (Exhibit 3, tab 9). On March 8, 2010 BF sent an email to the Respondent:

> Dear Peter,
>
> I have a receipt (September 26, 2008) for 200,000 USD that I gave to you in trust for M Capital with the agreement that I was to receive 400,000 “free trading” shares of C Inc. from your client and C Inc. President JN. JN assured me that those shares would be sent directly to my [bank] investor-line account within a week. I sent my banking information to JN’s secretary, JY. Because I never received the shares as promised, on October 2008 I sent an email to JN. JN phoned my husband and told him that we could meet for lunch and discuss the transfer of the shares, but that I shouldn’t send him emails anymore. JN told me at our lunch meeting that he thought that it was in my best interest to wait to receive my shares until C Inc. went to the “big board” which he said would happen in a few weeks. I believe the company finally went to the OTC bulletin board in December of 2009. I was told repeatedly by JN that there was going to be a split but that it would not affect my shares. My husband DF received an email from JN February 1, 2010 that there was going to be a 4 to 1 split, but no mention of if and when I would be receiving my shares.
>
> I have not and will not sign any release of the funds paid to M Capital and held in trust with Devlin Jensen. Please send me a bank cheque in the amount of 200,000 USD, plus interest at prevailing bank rates accrued from September 26, 2008 to date, to the above address within 5 business days and confirm via email that you have done so.

[46] The Respondent sent an email to BF on the same date saying:

> I’m a little surprised to receive your email. As you know, I was not involved in your discussions with JN nor in any transactions. All that occurred from our knowledge was that a cheque came made to us for M Capital and anything else was arranged between you. As the cheque was made for the trust of M Capital, they dealt with that as they wished. I would have no authority to deal with the funds even if they were still in the M Capital trust account.
>
> If you and DF wish I can try to help reconcile your issues with JN. DF has mentioned a number of times that you had not received shares and I’ve passed this on to JN. My understanding from the last discussion with DF is that you and DF wanted to wait to receive shares from the new company.
>
> I’m sorry this has been so delayed for you and DF.

POSITION OF THE PARTIES

[47] Counsel for the Law Society states that there is no dispute that the Respondent did not caution DF and BF pursuant to Chapter 4, Rule 1 of the *Professional Conduct Handbook*. He also submits that, in these circumstances, this is not a mere breach of a rule but that the conduct constitutes professional misconduct. The Law Society points to the harm occasioned and to the unusual transaction.

[48] The Respondent asks us to rely on the often repeated statement by BF that she knew that the Respondent was not her lawyer (and therefore she knew he did not represent her interest). The Respondent also asks us to consider the late complaint and then draw an inference against BF's testimony that the funds were put in trust at the Respondent's office awaiting transfer of the shares. In addition, the Respondent relies on the agency relationship between DF and BF. The effect of this submission is, if DF knew the Respondent only acted for JN and the Respondent only looked after JN's interests, then BF is fixed with that knowledge as well.

ANALYSIS

[49] Allegation one of the amended citation reads:

> 1. In the period from approximately September 2008 to April 2009, while you were representing C Inc., M Capital and its principal, JN, you accepted funds in trust in the amount of US$200,000 from BF and/or DF for the purchase of shares of C Inc. from M Capital and disbursed those funds on instructions from JN, without advising BF and DF that you were not protecting their interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*.
>
> This conduct constitutes professional misconduct.

[50] Although the Law Society started with two different but alternative "allegations", by the end of the hearing only the first allegation requires decision.

[51] The Law Society asked us to draw an adverse inference because JN was not called by the Respondent to give evidence. We decline to draw such an inference. We do so because it is clear to us that JN is equally adverse to both DF and BF and to the Respondent. JN was to be called at the hearing and arrangements by video were being made. We thank counsel for attempting such arrangements. However, both counsel decided not to proceed with that evidence. JN did not testify, but we have a body of evidence that we believe allows us to decide the issue fairly.

[52] Credibility is said to be in issue, but we do not believe this matter is a credibility contest.

[53] We find that the Respondent did not give the caution that is both prudent and necessary when the $200,000 US bank draft arrived in his office. We understand how he assumed that DF had knowledge of the way transactions work, but we find the Respondent knew the caution was required and necessary in these circumstances. He took some steps by contacting DF in the email dated October 1, 2008 where the Respondent sought confirmation of "deposit to M Capital". But that was not enough. The email should have cautioned DF and BF that the Respondent represented only JN and the Respondent was not protecting the interests of DF and BF. If this caution had been included, it would have been sufficient.

[54] We considered the submission that BF had the same knowledge of DF concerning the known fact that the Respondent only acted for JN and his companies. The "in trust" designation of the bank draft gives rise to an inference that the funds will be used for the purpose placed. In this case, DF was sloppy and too short in his response concerning the $200,000. It was certainly not the kind of letter a lawyer would write to

another lawyer about a client's interest in $200,000.

[55] DF's email should have caused further worry to the Respondent, not less. When the Respondent spoke to JN and received the general response to the effect "well let's wait until Christmas and I will give you instructions then, …" this should have caused more alarm bells to ring. Who are the proper parties to the agreement? This is a question that a reasonable lawyer should ask.

[56] We considered the issue of agency and concluded that the circumstances called for the Respondent to inquire. A look at the envelope or discussions with JN or DF and BF would immediately give knowledge that the intended owner of the shares was BF.

[57] The issue of friendship is also troubling. We find that friendship should give rise to propriety and not short cuts. The Respondent should not have assumed that, because he was generally known to be the lawyer for JN, that general knowledge was necessarily in the front of the minds of individuals dropping off $200,000 at his office. The Respondent had a professional obligation to caution DF and BF that he was not protecting their legal interests.

[58] The public interest, which is at the heart of the Rule, is commented on in *Law Society of BC v. Skogstad*, 2008 LSBC 19 at paragraphs [54],[56] and [59]:

> [54] The evil to which that provision in the Handbook is directed is the fear that an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where that impression is not accurate. On the facts of this case we have a large number of individuals, at least some of whom are likely to be unsophisticated, making trust deposits to the account of a lawyer who has been represented to them as the "lawyer for the pool".
>
> …
>
> [56] It is likely that the Respondent's reluctance to adopt that characterization of his role is a result of the responsibilities that are engaged by that finding. In particular, we find that the provisions of Chapter 4, Ruling 1 are applicable. If he is the lawyer for the pool and at the same time is not the lawyer for the individual investors, then he must tell them that he is not their lawyer. The evidence on this point is uncontroverted. He not only did not advise the individual investors that he was not protecting their interests, in the case of at least 183 of those individual investors, he was not able to tell them that he was not protecting their interests because he did not know who they were. That deficiency is the subject of another count in the citation in this matter.
>
> …
>
> [59] The count does not require that unrepresented members of the public actually rely on the belief that the Respondent is representing their interests. It is sufficient for the circumstances to be such that their interests were not being protected by the Respondent, although, in the circumstances of this case, in our view, it was reasonable for the investors to expect that the Respondent's involvement represented some level of protection for their individual interests.

[59] When BF delivered the bank draft, it was reasonable for her to believe that there would be some level of protection of the $200,000. We are aware that the Respondent believed that he was "off the hook" when DF wrote "please put in M Capital." However, we find that the public is entitled to believe that, when funds are placed into a lawyer's trust account, there is a default level of protection that can be overcome with an appropriate caution. Had the caution been given, the Respondent's obligations would have been fulfilled. Perhaps if BF or her agent had received the caution, the harm could have been avoided. We cannot look

into the past to determine if independent legal advice would have been sought, but the choice would have been documented and the professional obligation performed.

[60] Accordingly we find that the Respondent failed to fulfill his obligation under Chapter 4, Rule 1 of the *Professional Conduct Handbook*.

[61] We now look to the second issue: does the breach of that provision, in the circumstances, amount to professional misconduct?

[62] In *Law Society of BC v. Hops*, [1999] LSBC 29, [2000] LSDD No. 11, the majority of the Benchers on review stated:

> 54. The very peculiar nature of the circumstances by which large sums of money are flowing through the Member's trust account, from unknown sources, for an unknown purpose, *must* raise for the Member the applicability of Ruling 1, Chapter 4 of the *Handbook*. The circumstances confronting the Member on these facts are a vivid example of those in contemplation of the drafters of that ruling in the *Professional Conduct Handbook*. The significant size of the unexplained deposits must be taken into account when considering the conduct.
>
> 55. Counsel for the Member suggested that lawyers frequently receive deposits to trust from unknown depositors. This is not true. In addition to the requirement of the accounting rules to identify the source of all deposits, (a rule founded on sensible principle) there are an array of dangers inherent in receiving funds from an unknown source.
>
> 56. Lawyers must not be facilitators for the kinds of scams that were perpetrated by this Member's client, and compliance with the Ruling would have, at worst, alerted the duped complainant to issues of concern. It is not clear from the evidence on the record that the Member's observance of the Ruling would have prevented the scam. The complainant/investor seemed all to [sic] willing to amend his instructions when the issue was finally raised for his consideration.
>
> 57. It is not necessary to support a finding of professional misconduct for the Benchers to find that compliance with the conduct suggested in Chapter 4, Ruling 1 would have prevented the scam. It is enough to find a fact pattern that engages the ruling and to examine the consequences to see whether they appear to be contrary to the best interest of the public or of the legal profession.
>
> …
>
> 59. While the Benchers are not disposed to describe the conduct of the Member as dishonourable or disgraceful, we are of the view that, by reasons of the matters set out above, including the Member's failure to question the business efficacy of the underlying transaction, the conduct was unbecoming as being contrary to both the best interests of the public and the legal profession, and tended to harm the standing of the legal profession.
>
> [emphasis in original]

[63] Since *Law Society of BC v. Martin*, 2005 LSBC 16, the test for professional misconduct has evolved to a "marked departure" test. Does the conduct constitute a marked departure from that expected of a competent solicitor?

[64] We do find that the failure to caution in these circumstances is a marked departure from that expected of a competent solicitor and is therefore professional misconduct. We find the following factors support the finding of professional misconduct:

(a) the placement of $200,000 US funds "in trust";

(b) the unusual nature of the transaction (friend to friend);

(c) the enticing nature of the transaction. (DF and BF were to receive a $200,000 bonus from JN);

(d) the Respondent intended to put the caution in a simple agreement but the agreement was never drafted;

(e) the Respondent had the opportunity to provide the caution on several occasions after October 1, 2008 and prior to disbursement of any of the funds in January, 2009; and

(f) the potential harm arising from the failure to caution (the potential loss of $200,000 US).

[65] To use the words in *Hops* (supra), “it is enough to find the fact pattern that engages the ruling and to examine the consequences to see whether they appear to be contrary to the best interest of the public.” In this situation, the public would expect the caution to be given to permit the unrepresented individual an opportunity to consider independent legal advice. Nothing less would be expected by the public or the profession.

RESULT

[66] We find that the Respondent erred by failing to state that he did not represent the interests of DF and BF in the share transaction. In these circumstances that failure constitutes professional misconduct as set out in the first allegation of the amended citation.