

LAW SOCIETY OF NEW BRUNSWICK

UNDER S. 56 OF THE *LAW SOCIETY ACT, 1996*, c. 89, S.N.B. 1996;

**AND IN THE MATTER OF A HEARING BY THE DISCIPLINE COMMITTEE
INTO THE CONDUCT OF ALLAN LEVINE, THE RESPONDENT**

DECISION OF THE DISCIPLINE COMMITTEE

Date of Hearing:	11 March 2010
Date of Decision:	17 May 2010
Place:	Delta Brunswick Hotel, Saint John, NB
Members of Panel:	Bruce Eddy, Q.C., Chair Richard Petrie, Norman Branch, Public Representative
Appearances:	David Norman, Q.C., Counsel for the Society Lawrence Veniot, Counsel for the Respondent

Joint Book of Documents

Cover document of 2 pages entitled "Summary of Agreed Upon Facts" and supported by the following tabbed items:

- 1 Letter of Shirley MacLean, Deputy Executive Director of the Society to Allan Levine dated April 1, 2009
- 2 Letter dated June 2, 2009 of Deloitte (Lloyd Foote, FCA) to Shirley MacLean, Deputy Executive Director, enclosing working paper file of the audit of trust and general accounts of the Respondent, accompanied by Letter dated May 25, 2009 from Deloitte to the Society (Shirley MacLean) reporting on trust account of the Respondent supported by 22 items relating to the Respondent's trust account during the period from February to April 2009
- 3 Letter dated June 10, 2009 from Registrar of Complaints to the Respondent advising of her complaint under section 41(2) of the Act
- 4 Faxed letter dated June 22, 2009 from the Respondent to the Society
- 5 Letter of Registrar of Complaints to Respondent dated July 13, 2009 regarding referral by the Complaints Committee to the Discipline Committee
- 6 Letter of Chair of the Complaints Committee to the Respondent dated August 28, 2009 imposing conditions on the Respondent's practice

Panel Documents:

- A Notice of Complaint, dated September 2, 2009
- B Reply of the Respondent, dated September 16, 2009
- C Notice of Hearing of Discipline Committee dated January 11, 2010
- D Appointment of Panel dated January 11, 2010
- E Agreement, dated March 11, 2010
- F Agreement, dated March 18, 2010

Decision:

Panel

1. This panel was constituted under Part 10 of the *Law Society Act, 1996* (the “*Act*”) to inquire into charges of conduct deserving sanction against Allan Levine contained in a Notice of Complaint dated September 2, 2009.
2. The matter was referred to the Discipline Committee by decision of the Complaints Committee on July 13, 2009.

Hearing

3. The hearing was held in public, as required by subsection 62.2(1) of the *Act*, on March 11, 2010. The Respondent and the Society were represented by counsel. A court reporter recorded the proceedings.

Publication Restriction

4. Although no member of the public was present at the hearing, counsel for the Respondent requested that the panel exercise its discretion under section 62.2(2) of the *Act* to order that the names and any other information that might identify the Respondent’s clients not be disclosed in any publication of these reasons or of documents admitted in evidence at the hearing. The panel so orders because such information is not in this case necessary to the disposition of this case and the public interest in disclosure of such incidental information is outweighed by the privacy interests of those clients.

Documents

5. Before the hearing, the panel was provided with a book of documents that had been agreed between counsel. At the hearing, a second, more comprehensive, book of documents accompanied by a document entitled “Agreement” was given to the panel. We will refer in these reasons for decision to this second book of documents (the “**Joint Book of Documents**”) which was supplied to us at the hearing because it contains virtually all the documents from the pre-hearing book of documents and is the book of documents referred to in the “Agreement”. Only the Notice of Complaint and the Reply of the Respondent were omitted from the Joint Book of Documents used at the hearing so we have identified those documents separately as Exhibits A and B respectively.
6. In the “Agreement”, which was dated March 11, 2010,¹ the Respondent “admits the facts in the Summary of Agreed Upon Facts attached hereto at Tab 1,² and admits the charges against him.”

¹ Exhibit E.

² The two-page document entitled “Summary of Agreed Upon Facts” actually appears just before Tab 1 in the Joint Book of Documents.

Notice of Complaint

7. The Notice of Complaint³ referred charges of conduct deserving sanction to the Discipline Committee as follows:

- 2 a) You provided post-dated cheques from your trust account to the Law Society of New Brunswick dated March 13, 2009, April 1, 2009, May 1, 2009 and June 1, 2009 which were payments of a deductible to the professional liability insurer contrary to Rule 4 of the *Uniform Trust Account Rules* pursuant to the *Law Society Act, 1996*;
- 2 b) An audit of your trust account was conducted by the accounting firm of Deloitte & Touche for the period covering February, March and April 2009 and a report provided by Deloitte & Touche dated May 25, 2009. This report was provided to you on June 10, 2009 setting out full particulars of the following areas of noncompliance with the *Uniform Trust Account Rules* pursuant to the *Law Society Act, 1996*:
 - (i) Failure to maintain your trust accounting records in compliance with Rule 2 of the *Uniform Trust Account Rules*;
 - (ii) Failure to promptly deposit client funds into your trust account within the first banking date of receiving the same contrary to Rule 3(1) of the *Uniform Trust Account Rules*;
 - (iii) Failure to obtain confirmation of an electronic funds transfer to your trust account contrary to Rule 3(3) of the *Uniform Trust Account Rules*;
 - (iv) Failure to withdraw promptly legal fees earned from your trust account contrary to Rule 4(1) of the *Uniform Trust Account Rules*;
 - (v) Making disbursements from your trust account without supporting documentation contrary to Rule 4(2) of the *Uniform Trust Account Rules*;
 - (vi) Making withdrawals for legal fees from your trust account without a billing or written notification having been delivered to the client contrary to Rule 4(2)(c) of the *Uniform Trust Account Rules*;
 - (vii) Withdrawing monies from your trust account contrary to Rules 4(2) and 4(3) of the *Uniform Trust Account Rules*;

Reply

8. The Respondent replied to the Notice of Complaint by letter dated September 16, 2009.⁴ He provided explanations of the discrepancies, admitted that he had not been properly maintaining his trust account as required by the *Uniform Trust Account Rules* under the *Act* and undertook to resolve the problems by changing his book-keeping practices.

³ Exhibit A

⁴ Exhibit B.

Facts

9. The facts set out below are taken from Joint Book of Documents, including the Summary of Agreed Upon Facts, and from the answers given by the Respondent and his counsel to questions from the panel.

10. After working in industry for a number of years, the Respondent obtained his law degree from Queen's University in 1994, was called to the New Brunswick bar in 1995 and then joined the Hampton law firm of Veniot Loughery Levine. He worked for that firm as an associate until 2007 when he set up practice on his own in Hampton, NB. He has no discipline record.

11. The events leading to this proceeding began with a letter dated March 11, 2009⁵ from the Insurance Management Committee of the Society to the Respondent requesting post-dated cheques for a special deductible assessed against him under the Insurance Management Committee's professional liability insurance policy. When the Society noticed that the post-dated cheques furnished by the Respondent had been drawn on his trust account – an account intended to be earmarked for clients – the Registrar of Complaints was alerted and she ordered an investigation by Deloitte & Touche LLP, Chartered Accountants.

12. The Deloitte audit disclosed a number of discrepancies but what was most significant to the panel was the revelation that the cause of some of the discrepancies was the Respondent's commingling of trust funds with his own funds. In other words, the Respondent was using the trust account as both a trust account and a general account.

13. The Respondent's explanation for this was that:⁶

With respect to Rule 4(1), the accountant indicated that a general account was not maintained due to a Canada Revenue Garnishee on all accounts and I erroneously did not draw fees immediately due to this issue and an inability to maintain a current fund from which H.S.T., Bar Dues and Insurance could be paid. I had also arranged to make cheques payable due to the Law Society to retire a deductible from a previous accident error. These cheques have not been returned, or cashed, but did, in my opinion, represent draws. These cheques were drawn on fees maintained in my Trust Account but not drawn.

14. The garnishee referred to in the Respondent's explanation was a Requirement to Pay issued by the Canada Revenue Agency on September 4, 2008 to the Bayview Credit Union where the Respondent had maintained his general account.⁷ It ordered the Bayview Credit Union to re-direct to the Receiver General any payments out of the Respondent's general account until the Respondent's tax debt of \$15,980.86 was paid.

15. However, the result of the garnishee was that the Respondent suffered from what he described as "an inability to maintain a current fund from which H.S.T., Bar Dues and Insurance could be paid." In short, since he could not pay his tax debt he decided to use his trust account to operate his practice instead of his general account. We infer that the

⁵ Joint Book of Documents, Tab 1, page 2.

⁶ Joint Book of Documents, Tab 4, page 3, paragraph 5.

⁷ Joint Book of Documents, Tab 4, page 7.

Respondent chose to do this because the garnishee was, of course, directed at the account that belonged to him – his general account – rather than the account that was maintained for his clients – his trust account.

16. The Statement of Agreed Upon Facts makes it clear in paragraph 10 that the audit showed that:

“...there has not been any defalcation on the part of Mr. Levine with respect to his trust account nor any fraud, deceit or loss to any client of Mr. Levine.”

17. The Complaints Committee before which the Respondent appeared on July 29, 2009 imposed a condition on the Respondent's practice, pending disposition of the matter by this panel, that he provide the Registrar of Complaints with a letter from his accountant confirming completion of monthly trust account reconciliations in compliance with the *Uniform Trust Account Rules* and that the trust account reconciliations be verified with the client ledger sheets.⁸

18. At the hearing before us, the Respondent assured the panel that he now had an account, other than his trust account, that he could use in the conduct of his practice without being hampered by a Requirement to Pay.

Finding of Conduct Deserving Sanction

19. The Respondent having, in the March 11, 2010 Agreement,⁹ admitted the facts in the Statement of Agreement Facts and the charges set out in the Notice of Complaint, the panel found the factual elements of the charges to be proved and found the Respondent guilty of conduct deserving sanction as charged.

Sanction

20. The March 11, 2010 Agreement also contained the Respondent's consent to an order under paragraph 60(1)(a) of the *Act* that he be reprimanded and pay costs of \$5,500.00 and that for a period of two years he provide, through his accountant, quarterly reports to the Registrar of the Society providing details of compliance with the *Uniform Trust Account Rules*.

21. Counsel for the Respondent requested that the Respondent be given time to pay the costs.

22. Despite the agreement as to recommended sanction, we must satisfy ourselves that the proposed sanction is within the range of appropriate sanctions for the misconduct of which the Respondent has been found guilty. This burden on the panel is derived by analogy to plea agreements in criminal cases, as explained by James T. Casey in *The Regulation of Professions in Canada*:¹⁰

⁸ Statement of Agreed Upon Facts, paragraph 8.

⁹ Exhibit E.

¹⁰ James T. Casey, *The Regulation of Professions in Canada* (looseleaf ed. current to 2008) (Toronto: Thomson, 2003) at p. 14-14.

It is a common practice in criminal law for the prosecutor and defence counsel to agree that in return for the guilty plea of an accused person and possibly an agreement on the facts of the case, counsel will make a joint submission on the appropriate penalty. Such an agreement cannot usurp the discretion of the disciplinary tribunal which is still duty bound to impose what they consider to be an appropriate sentence. [emphasis added; footnotes omitted]

23. The principles to be applied in determining the appropriate sanction are set out in Gavin MacKenzie's text, *Lawyers and Ethics: Professional Responsibility and Discipline*, as follows:¹¹

Factors frequently weighed in assessing the seriousness of the lawyer's misconduct include the extent of injury, the lawyer's blameworthiness, and the penalties that have been imposed previously for similar misconduct. In assessing each of these factors, the discipline hearing panel focuses on the offence rather than the offender and considers the desirability of parity and proportionality in sanctions and the need for deterrence. The panel also considers an array of aggravating and mitigating factors, many of which are relevant to the likelihood of recurrence. These aggravating and mitigating factors include the lawyer's prior discipline record, the lawyer's reaction to the discipline process, the restitution (if any) made by the lawyer, the length of time the lawyer has been in practice, the lawyer's general character and the lawyer's mental state. . . .

24. Among the other factors to be considered is the congruence between the recommended sanction and the sanctions imposed in similar cases.

A conscious comparison should be made between the case under consideration and similar cases wherein sentences were imposed. If the comparison with other cases is not undertaken, there may well be such a wide variation in the result as to constitute not simply unfairness but injustice.¹²

25. Mr. MacKenzie in his text on lawyers and ethics states that:¹³

Private reprimands or admonitions are . . . generally reserved for first offenders who are guilty of relatively minor misconduct in cases in which no significant injury has resulted.

He goes on to say that, rather than fines, "[l]awyers have more often been required to pay or contribute toward the costs of investigations and hearings."

26. We have also taken note of the cases collected in Mr. Casey's text¹⁴ in chapter 14 on "Sentencing" which include discipline cases involving lawyers as well as other professionals.

¹¹ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (looseleaf ed. current to 2008) (Toronto: Carswell, 1993) at pp. 26-43 and 26-44.

¹² per Cory J. in *Stevens v. Law Society of Upper Canada* (1979) 55 OR (2d) 405; CarswellOnt 749 at para 30 (Div.Ct.); cited with approval in *Ryan v. Law Society of New Brunswick* (2001) 236 NBR (2d) 243; CarswellNB 124 at para 22 (CA), rev'd on appeal [2003] 1 SCR 247; 2003 CarswellNB 145, Iacobucci J. noting at para 60 that it was the panel's task to determine what cases were comparable.

¹³ Gavin MacKenzie, *op cit*, at p.26-53.

¹⁴ James T. Casey, *op cit.*, p. 14-15 *et seq.*

27. The panel has considered the factors mentioned above including the fact that this is a first offence for a lawyer who has been practising law for 14 years, that no client was prejudiced by the Respondent's misconduct, that the Respondent promptly acknowledged to the Society his error in managing his law firm accounts, has complied with the order of the Complaints Committee as to maintenance of his trust account and accepted responsibility for his misconduct.

28. On the other hand, protection of the public requires that lawyers scrupulously respect the rules regarding their handling of client funds. That means not using for the trust fund as a form of shelter from the lawyer's personal creditors. It is this element of the Respondent's conduct that, in our view, warrants not only a reprimand but an order for payment of costs.

29. At the hearing, the panel expressed concern that the Respondent did not appear to have a dedicated general account for his practice as contemplated by the *Uniform Trust Account Rules*. We asked counsel to see if they could agree on an amendment to their recommended penalty that would deal with this point. The result was an amended Agreement, dated March 18, 2010,¹⁵ which contained the additional requirement that the Respondent's quarterly reports include confirmation that he maintains a dedicated general account for his practice.

30. The panel therefore accepts the recommendation of counsel for the Society and counsel for the Respondent contained in the March 18, 2010 Agreement and makes the following orders:

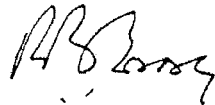
[The panel's orders are on the next page]

¹⁵ Exhibit F.

IT IS HEREBY ORDERED THAT:

- (a) the Respondent is reprimanded for his misconduct itemized in the Notice of Complaint dated September 2, 2009;
- (b) the Respondent, through his accountant, shall provide quarterly reports to the Registrar of the Law Society of New Brunswick which may be in the form of the Accountant's Trust Account Report, being Part B of Form 1 under the *Uniform Trust Account Rules under the Law Society Act, 1996* ("Uniform Trust Account Rules"), providing details of compliance with the *Uniform Trust Account Rules*. The accountant's report shall include confirmation that the Respondent maintains a dedicated general business account that is clearly distinguishable from the Respondent's trust account in compliance with section 2(1) of the *Uniform Trust Account Rules* and in particular paragraphs (e), (f) and (j) thereof. The quarterly reports shall be provided for a two-year period commencing April 30, 2010. The Respondent will be required to file his usual annual Form 1, required by all members on June 30, 2010; and
- (c) the Respondent shall pay to the Law Society of New Brunswick costs of the inquiry of the Law Society of New Brunswick into the complaint pursuant to section 60(1)(e) of the *Law Society Act, 1996* in the amount of \$5500.00, payment terms to be agreed between the Respondent and the Registrar, failing which agreement, either party to be at liberty to apply to a panel of the Discipline Committee for directions.

DATED this 17th day of May 2010.



Chairman, on behalf of the panel