CANADA)
)
PROVINCE OF SASKATCHEWAN)
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TO WIT:)

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF
Michael Nolin of Saskatoon, Saskatchewan A LAWYER

The Law Society of Saskatchewan
Discipline Decision 08-04
Michael Nolin of Saskatoon, Saskatchewan

DECIDED: October 3, 2008

Drew Plaxton on behalf of The Law Society of Saskatchewan
Morris P. Bodnar, Q.C. on behalf of Michael Nolin

Jurisdiction and Responsibility

1. The jurisdiction and authority of the Law Society of Saskatchewan to govern itself through the regulation and discipline of its members is reviewed in the decision of the Benchers in its decision to disbar Susan Rault made the 18th of April, 2008 #08-02 and need not be repeated here.

2. The Law Society's responsibility for discipline is a serious one that has been given considerable deference by the Government of Saskatchewan and the Saskatchewan Court of Appeal. It must therefore be exercised with great care in each case and with full regard for its public policy importance. We find it helpful in this context to examine the scope and importance of the responsibility for discipline reposed in the Benchers by the *The Legal Profession Act, 1990.*[1] As the Benchers observed in *Rault,*[2] it is well settled that the duty and responsibility to discipline members for conduct unbecoming is rooted in the public interest and the legal profession's duty to protect the public. This is the duty of government in the first instance and has been delegated by the legislature to the Law Society of Saskatchewan which has exclusive responsibility to discipline its members as an aspect and privilege of self-governance and regulation.

3. The responsibility is created by the general language of *The Legal Profession Act, 1990* which imposes a duty on the Benchers to discipline a member for "conduct unbecoming". The definition of "conduct unbecoming" is cast only in general terms by section 2(1)(b). As the authorities cited in *Rault* suggest, it is the responsibility of the Benchers in the first instance to apply this definition and to then determine what constitutes conduct unbecoming in a given circumstance.

4. The decision of the Benchers in discipline matters is subject only to a member's right of appeal under section 54(1) of *The Legal Profession Act, 1990.* While the right of appeal confers authority on the Court of Appeal to "make such order relating thereto...as the court may direct", the Saskatchewan Court of Appeal has narrowly interpreted the scope of its own powers on review holding that considerable deference should be afforded the decisions of Benchers on appeal to that court (*Merchant v. Law Society of Saskatchewan*[3]). As the court observed in *Merchant*, greater deference has been given in more recent times. Notwithstanding the broad statutory powers of the Court of Appeal on review, the Court in *Merchant* limited the scope of its review in quoting from its decision in *Lamontagne v. Law Society of Saskatchewan*[4] stating:[5]

> [25] While on their face, the right of appeal and the jurisdiction of the court are wide open, the scope of review is nevertheless conditioned by several considerations. First, and as a matter of principle, the Court has an appellate rather than an original role, and as such its function, at least at the outset, is one of review for error: *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173. Second, and as a matter of tradition, the purpose and policy of the Act, the

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1 *The Legal Profession Act, 1990,* S.S. 1990-1991, c. L-10.1 [*The Legal Profession Act, 1990*].
2 Law Society of Saskatchewan Benchers Discipline Decision 08-02 decided on April 18, 2008 [*Rault*], appeal pending before Saskatchewan Court of Appeal.
3 [2002] 8 W.W.R. 214 (Sask. C.A.) [*Merchant*].
4 [1991] 4 W.W.R. 481 (Sask. C.A.) [*Lamontagne*].
5 *Supra*, note 3 at para. 18.

> constitution and function of the Committee, and the discretionary nature of the s. 59 powers entrusted to the Committee, all serve to narrow the scope of review. *Re A Solicitor*, [1956] 3 All E.R. 516.

5. In reviewing the jurisprudence, including the Supreme Court of Canada authorities, the Saskatchewan Court quoted further from *Lamontagne* and observed that great deference has been given to Benchers' decisions in more recent times:[6]

> [26] Having regard for these considerations, and calling to mind the traditional appellate approach to reviewing the exercise of judicial discretion, it seems to me that **unless the Discipline Committee in the exercise of its s. 59 powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the Court ought not interfere, except in the rarest of cases.** [emphasis added]
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> [27] In other words, if the matter comes down, free of error, to the exercise by the Committee of its best judgment, an appellant will have to make out "a very strong case" for intervention by the Court: *Re A Solicitor*, [1956] 3 All E.R. 516; approved in *McCoan v. General Medical Council*, [1964] 3 All E.R. 143 (P.C.). The Court will not simply substitute its judgment for that of the Committee. For comparable cases in other professions, see *Page v. Saskatchewan Registered Nurses' Association* (1983), 26 Sask. R. 108 (Q.B.); *Thomas v. Saskatchewan Nurses' Association* (1987), 61 Sask. R. 16 (Q.B.); *Crawford v. College of Physical Therapists (Sask.)* (1986), 48 Sask. R. 155; (Q.B.) and *Larson v. Sask. Land Surveyors Association* (1988), 65 Sask. R. 292 (Q.B.).
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> [28] In *Re A Solicitor*, [1956] (cited above), Goddard C.J., with the concurrence of Hilbery and Asworth, JJ., noted at pp. 517-18 B and this in the context of an appeal by way of rehearing, which, of course, is broader than that before us:
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> > This court is always, and always has been, very loth [sic] to interfere with the findings of the Disciplinary Committee either on a matter of fact, because they understand these matters so well, or with respect to penalty. If a matter were one of professional misconduct it would take a very strong case to induce this court to interfere with the sentence passed by the Disciplinary Committee, because the Disciplinary Committee are the best possible people for weighing the seriousness of professional misconduct . . . If there was any suggestion against the professional conduct of the solicitor [who in this case was convicted of a criminal offence unrelated to his practice] we should interfere in only the most extreme case . . .
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> [29] In *McCoan v. General Medical Council*, Lord Upjohn, speaking for the Board at p. 147, expressly agreed with this expression of the general standard of review in cases of this nature, and then went on to say that, unless convinced "the sentence" under appeal was "wrong and unjustified", the Board would not interfere. See, too, *Re A Solicitor (No. 2)* (1923) 93 L.J.K.B. 761; *Re A Solicitor*, [1969] 3 All E.R. 610; *Law Society of Upper Canada* (1988) 28 O.A.C. 375; *Haunholter v. Law Society of Alberta* (1988), 88 A.R. 313.

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6 *Supra*, note 3 at para. 18.

6. The Court then referenced the Supreme Court of Canada authorities establishing deference for law societies' discipline authority:[7]

> 19 The next case of assistance to the resolution of this appeal is *Pearlman v. Law Society (Manitoba)*. In that case, Mr. Pearlman wanted to prohibit the Law Society from inquiring into three counts of conduct unbecoming. His grounds included bias and two contraventions of the *Charter of Fundamental Rights and Freedoms* including unreasonable delay. In establishing the context in which the issues were to be considered, Iacobucci J., speaking for the Court, reviewed generally the expertise of law societies disciplining their members:
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> > In the case at bar, the Manitoba Legislature has spoken, and spoken clearly. *The Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected.
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> This was said, notwithstanding s. 54(1) of *The Law Society Act*, which, like the Act before this Court, contains no privative clause and provides the member a right of appeal to the Court of Appeal where the Court may " make such order relating thereto . . . as to the court may seem meet."
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> 20 Iacobucci J., citing with approval Monnin C.J.M. in *Law Society (Manitoba) v. Savino*, wrote these words:
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> > The general public has a vested interest in the ethical integrity of the legal profession: see, for example, the remarks of Estey J. in *Attorney General of Canada v. Law Society of British Columbia*,[[1982] 2 S.C.R. 307]. As already mentioned, the provincial Legislature has entrusted the protection of this interest to the considered judgment of the members of the legal profession itself.
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> > **To my mind, a large part of effective self-governance depends upon the concept of peer review. If an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential. It is entirely appropriate that an individual whose conduct is to be judged should be assessed by a group of his or her peers who are themselves subject to the rules and standards that are being enforced.** As Monnin C.J.M. recognized in *Re Law Society of Manitoba v. Savino*, supra (at pp. 292-93): [emphasis added]
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> > > Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. **It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct.** Professional misconduct is a wide and general term. It is conduct which would be reasonably

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7 *Supra*, note 3 at paras. 19 - 20.

> regarded as disgraceful, dishonourable, or unbecoming of a member of the profession by his well respected brethren in the groupBpersons [sic] of integrity and good reputation amongst the membership.
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> **No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.**
> [emphasis in original]

In the same case at trial, Jewers J. had this to say:

> What is and what is not professional misconduct is a matter for the benchers to determine as their decision is based on a professional standard which only they, being members of the profession, can properly apply . . . .
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> . . . If the facts set out in the charges can reasonably be regarded as disgraceful or dishonourable, then it is open to the benchers to decide whether the conduct alleged, if proved, does -- or does not -- constitute professional misconduct. The decision is not one for this court to make at this stage of the proceedings, but it is eminently a judgment to be made by the benchers who are the proper arbiters of professional standards. The only question for me is whether the allegations, if proved, are reasonably open to the interpretation of professional misconduct.

7. As the Court of Appeal in *Merchant* observed at paragraph 26, the Supreme Court of Canada did not have occasion to consider the expertise and role of a law society since *Pearlman*,[8] but several jurisdictions in Canada continued to define the appropriate standard of appellate review by reference to the Supreme Court of Canada's decisions in *Pearlman* and *Southam Inc.*[9] Since our oral decision in this matter, the Court of Appeal in *E.F. Anthony Merchant Q.C. v. The Law Society of Saskatchewan* [10] affirmed Justice Iacobucci's observations in *Pearlman.*

8. Legislatures have promoted a public perspective in the makeup of the Benchers and members of Discipline Committees. In *Ryan v. Law Society (New Brunswick)*,[11] the Supreme Court of Canada said this of the preferred and evolving expertise of the Discipline Committee, relative to courts:[12]

> 31 First, the Discipline Committee has greater expertise than courts in the choice of sanction for breaches of professional standards. By s. 55(1)(a) of the Act, the Discipline Committee is composed of a majority of members of the

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8 *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 [*Pearlman*].
9 *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
10 *E.F. Anthony Merchant, Q.C. v Law Society of Saskatchewan* (2009), 2009 SKCA 33 at para. 22 ["*Merchant No. 2*"].
11 [2003] 1 S.C.R. 247 [*Ryan*].
12 *Ibid.* at paras. 31 - 34.

> Law Society who are subject to the same standards of professional practice as the lawyers who come before them. Current members of the Law Society may be more intimately acquainted with the ways that these standards play out in the everyday practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity (see *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 890, *Law Society (Manitoba) v. Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.), at pp. 292- 293); on the matter of expertise, see also *Moreau-Bérubé c. Nouveau-Brunswick* , [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 43-53.
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> 32 Second, members of the public are appointed to the Discipline Committee pursuant to s. 55(1)(b) of the Act. There will always be one lay person on a panel of the Committee by operation of s. 55(4). Although they will presumably have less knowledge of legal practice than judges or the members of the Law Society, lay persons may be in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice. Since these are central concerns in the Act, the lay member of a Discipline Committee provides an important perspective for the tribunal in carrying out its duties.
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> 33 Third, the Discipline Committee has relative expertise generated by repeated application of the objectives of professional regulation set out in the Act to specific cases in which misconduct is alleged. In each case, the Committee will be called on to interpret those objectives in the factual context. This, we can assume, will tend to generate a relatively superior capacity to draw inferences from facts related to professional practice and also to assess the frequency and level of threat to the public and to the legal profession posed by certain forms of behaviour.
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> 34 The Discipline Committee's expertise is not in a specialized area outside the general knowledge of most judges (such as securities regulation in *Pezim, supra*, or competition regulation in *Southam, supra*). However, owing to its composition and its familiarity with the particular issue of imposing a sanction for professional misconduct in a variety of settings, the Discipline Committee arguably has more expertise than courts on the sanction to apply to the misconduct.

9. While the Supreme Court of Canada later simplified the standard of review of administrative decisions in *Dunsmuir*,[13] the court still held there that "where the question is one of fact, discretion or policy, deference will usually apply automatically".[14]

10. In *Ryan*, the Supreme Court of Canada said this of the Discipline Committee's role in drawing inferences and weighting factors in determining a sanction:[15]

> [...] The question of what sanction Mr. Ryan should face as a result of his misconduct is a question of mixed fact and law since it involves the application of general principles of the Act to specific circumstances. The Court of Appeal impugned the weight that the Committee assigned to particular mitigating evidence and also disapproved of the Committee's selection of factually similar

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13 *Dunsmuir v. New Brunswick (Board of Management)*, [2008] 1 S.C.R. 190.
14 *Ibid.* at para. 53.
15 *Supra*, note 11 at para. 41.

> cases. These are fact-intensive elements within the question of mixed fact and law. They do not involve easily extracted and discretely framed questions of law. The Committee's decision on sanction is not one that will determine future cases except insofar as it is a useful case for comparison. The decision is intricately bound to many factual findings and inferences about the misconduct of Mr. Ryan and the interests of the public and the profession. The Committee clearly benefited from the opportunity to hear the testimony and cross-examination of Mr. Ryan and of the expert witnesses. All this suggests that a higher degree of deference should be afforded to the Disciplinary Committee.

11. Where the facts before the Discipline Committee are in the form of a written admission of facts and therefore a matter of record, the Discipline Committee has no unique advantage. Nonetheless, the Saskatchewan Court of Appeal in *Lamontagne* held that the Discipline Committee was better positioned to draw inferences:[16]

> 22 What are the general principles that should guide the court in passing upon a sentence appeal of this nature? No express directions are found in s. 60(8) or any other provisions of the Act but, **given the standard of review with respect to matters of fact, we are of the opinion that inferences to be drawn from proven facts are essentially a matter for the discipline committee.** In this case the appellant contends that the committee drew unwarranted inferences from the admitted facts. We do not share that view and reject this complaint because the allegations of misconduct were clearly articulated and his admission of such misconduct was clearly evidenced not only by the plea of guilty but also in the admission of facts covering each allegation. [emphasis added]

12. Professor Richard Devlin also references the long held view by the Court that the "independence of the Bar is an unqualified social good and that, of necessity, such independence requires self-governance".[17] In his paper, Professor Devlin also references Justice Estey's speech from *Jabour*[18] where he stated:[19]

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in the fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of the position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

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16 *Supra*, note 4 at para. 22.

17 Richard F. Devlin & Porter Heffernan, "The End(s) of Self-Regulation?" (2008), Alta. L.R. 169 at p.186.

18 *Canada (Attorney General) v. Law Society (British Columbia) (sub nom. Jabour v. Law Society (British Columbia)* (1982), 2 S.C.R. 307 at para. 52 [*Jabour*].

19 *Supra*, note 17 at p. 186.

13. While Professor Devlin suggests that the premise of this passage may be open to question, it is nonetheless well settled that lawyers are seen as important gate keepers of the judicial system. He also stated:[20]

> [...] The bar is the nursery for the judiciary and an independent legal profession helps to foster the independence and impartiality so essential to the judicial role.

14. To ensure equal access to justice by its citizens, the legal profession must be seen as being free from influence from political and other quarters such that individual rights are not subordinated to government or other institutional interests. The independence of the judiciary is also promoted when counsel, who are also officers of the court, are themselves not subject to the direct rule of government.

15. As this review demonstrates, there is a well settled historical deference given to the decisions of the Benchers, and to the authority of Law Societies generally to self-govern and regulate their members. But this right to self govern also imposes a responsibility to protect the vulnerable. In *Pearlman*, Justice Iacobucci quoted with approval from a report commissioned by the Attorney General of Ontario:[21]

> The regulation of professional practice through the creation and the operation of a licensing system, then, **is a matter of public policy; it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests**. [emphasis in original]

16. This responsibility conferred on the legal profession a duty to promote the independence of the judicial system in the public interest:[22]

> On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of these bodies. Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice. **In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable**. [emphasis added]

The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:

> Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or

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20 *Supra*, note 17 at p. 187.
21 *Supra*, note 8 at para. 41.
22 *Ibid.*

> favour in the protection of individual rights and civil liberties against incursion from any source, including the state.
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> **On this view, the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.**
> [emphasis added]

17. The Supreme Court of Canada has suggested a straightforward exchange of power and responsibility exists between government and self governing organizations. The Court noted with approval in *Ryan*:[23]

> [...] As David A.A. Stager writes in *Lawyers in Canada* (Toronto: University of Toronto Press, 1990), at p. 31: "The privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned" (see also *Pearlman, supra*, at pp. 887-888).

18. Thus, the privilege of nearly autonomous self-governance generally imposes the very considerable responsibility on the Law Society to govern its membership in the public interest, such that the protection of vulnerable interests is imperative and paramount.

19. Apart from the definition of conduct unbecoming, *The Legal Profession Act, 1990* does not expressly prescribe a duty to protect the public, and to preserve the public's confidence in its governance. But the Saskatchewan Court of Appeal has said this responsibility is implicitly imposed on the Law Society of Saskatchewan by virtue of its self-governing status. In *Lamontagne*, Tallis, J.A., writing for the majority, stated: [24]

> 21 In the circumstances we fully appreciate and understand the discipline committee's emphasis on protection of the public. A self-governing body is obliged to protect the honour of the profession and maintain the confidence which it is desirable the public should have in lawyers whose advice and services they seek. Furthermore, the integrity of the profession is undermined if professional misconduct of this nature is not restrained. The law society has a duty not only to the public but also to all other members of the profession to maintain high standards of professional conduct. [...]

20. While the Law Society has a concurrent duty of procedural and substantive fairness to its members, the overarching duty to the public forms the course and outcome of the discipline process. This duty is best fulfilled by a process which is demonstrably seen to protect the public and which therefore sustains the trust and confidence of the public. The public is entitled to every assurance that members in good standing can be trusted to a requisite level of competency and integrity. Where a member is guilty of conduct unbecoming, the discipline process must apply a sanction that appropriately balances the legitimate interests of the member against the paramount need to protect the inherently vulnerable interests of the public.

21. In so doing, the Benchers have a duty to act judicially, with due regard to the relevant factors and appropriate sentencing objectives. The proper exercise of this power and discretion

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23 *Supra*, note 11 at para. 36.
24 *Supra*, note 4 at para. 21.

will sustain the public's confidence and trust in the profession's ability to govern and regulate itself. Where the self-governance model no longer serves the public interest, the legitimacy of self-governance is brought into question. As Professor Devlin has observed in other jurisdictions in the Commonwealth, the right of the legal profession to self-govern, including aspects of regulation and discipline, has been removed or limited. The jurisdictions of Australia and the United Kingdom are considering and implementing reforms to provide an independent government appointed body to handle the complaints and discipline process, with some supervised involvement by the Law Society. In Scotland, Ireland and New Zealand, other processes are in place to establish an independent regulatory agency in matters involving complaints against lawyers.

22. But in Canada, the legal profession's privilege of self-governance has not undergone any serious challenge. As Professor Devlin has observed in the examples of *Jabour* and *Pearlman*: "The Supreme Court of Canada has shown great solicitude for the independence of the bar."[25] As noted above, the Saskatchewan Court of Appeal has observed that appellate courts at the provincial level have demonstrated similar deference for the independence of the Bar in the discipline of its members. The legislatures throughout Canada continue to demonstrate confidence in the profession by statutorily authorizing the profession to regulate itself. But the privilege of self-governance and regulation may only be maintained if the Law Society vigilantly exercises its delegated authority in protecting the paramount interests of the public, such that the public confidence is sustained. In the ongoing analysis, the legal profession's accountability in discipline matters will continue to be measured by the efficacy and probity of its discipline process in serving the public interest.

23. As Gavin MacKenzie, in his book Lawyers & Ethics stated:[26]

> The purposes of the Law Society discipline proceedings are not to punish offenders or exact retribution but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

24. Thus, the public interest, and the need to protect the public, directs the discretion to be exercised by the Law Society in its self-governance role, particularly in the area of discipline, where professional misconduct brings the member into direct conflict with the public's paramount right and expectation that a member may be trusted in all respects and that the public will be protected in all events. The paramountcy of the public interest in discipline matters was most recently confirmed by the Saskatchewan Court of Appeal in *Merchant No. 2*.[27]

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25 *Supra*, note 17 at p. 208.

26 Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline (3rd ed.)*, looseleaf, (Toronto: Carswell, 1993, updated as of November 13, 2008), at p. 26-1.

27 *Infra*, note 51.

Procedural History

25. This matter initially proceeded before the Hearing Committee consisting of Eileen V. Libby, George Patterson and Karen Topolinski, Chair (the "Hearing Committee). The Hearing Committee convened on August 28, 2008 in Saskatoon.

26. At that hearing, the formal complaint was amended by consent with charges #2 and #3 subsumed into count #1 and count #5 withdrawn. A plea of guilty was entered to the following charges, such that the Hearing Committee found that Mr. Nolin:

> **1. Is guilty of conduct unbecoming a lawyer, in that he did misappropriate certain sums from funds held in trust on behalf of clients, particulars of which are:**
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> **(a) The sum of $1,000.00 from funds held in trust on behalf of a client E.B.;**
> **(b) The sum of $800,00 from funds held in trust on behalf of a client D.W.; and**
> **(c) The sum of $1,000.00 from funds held in trust on behalf of a client C.E.;**
>
> **[...]**
>
> **4. Is guilty of conduct unbecoming a lawyer, in that he did prepare, or cause to be prepared, documents including accounting records, cheques, trust statements each of which contained information which was false;**

27. Pursuant to s. 51 of *The Legal Profession Act, 1990* the Hearing Committee made no sentencing recommendation and referred the matter to the Benchers and this Discipline Committee sitting as a whole (the "Discipline Committee") in Saskatoon on October 3, 2008. The hearing then proceeded before the Discipline Committee on the basis of an Agreed Statement of Facts and other exhibits. The entire record of evidence before the Hearing Committee was in evidence before the Discipline Committee. The Law Society was represented by Mr. Drew Plaxton. Mr. Nolin was represented by Mr. Morris P. Bodnar, Q.C. The report of the Hearing Committee, the Agreed Admission of Facts and Agreed Statement of Costs were entered as exhibits at the hearing.

28. A quorum of Benchers was established at the hearing. There was no objection to the jurisdiction or composition of the Discipline Committee. There were no preliminary motions or other objections. Convictions were entered by the Discipline Committee on all charges as amended. Mr. Nolin adduced written evidence in the form of references from the Law Firm, other lawyers and a report from his counsellor. The Discipline Committee received submissions as to sentencing from both counsel and a written brief from Mr. Plaxton. Mr. Nolin also addressed the Discipline Committee and answered questions from the Benchers.

29. The Benchers deliberated and rendered an oral decision on October 3, 2008. The Chair indicated written reasons would follow. The Benchers have since reviewed this document and confirm it reflects the analysis and reasoning employed by the Benchers in reaching their oral decision on October 3, 2008. Consistent with the Benchers' responsibility to be transparent and

accountable about the decision making process, this document also embodies the jurisprudence and other authorities relevant to the principled approach used in forming this decision.

Charges

30. In the initial formal complaint, each of the charges referenced Chapter I of the *Code of Professional Conduct* (the "Code"), "Integrity".

Charge #1 - Is guilty of conduct unbecoming, in that he did misappropriate certain sums from funds held in trust on behalf of clients in three separate matters.

31. In each of these cases, Mr. Nolin defrauded his employer (the "Law Firm") for his own benefit. To facilitate this fraud, he used funds held in trust for clients for purposes not authorized by those clients. The payments involved were made on three separate matters from trust funds held by three separate clients on September 21, 2007, October 19, 2007 and October 23, 2007.

Charge #2 - Is guilty of conduct unbecoming, in that he prepared documents, including accounting records, cheques, trust statements, each of which contain false information.

32. The above described transactions were facilitated by false or fraudulent documents and entries made by Mr. Nolin, including trust account cheques payable to Mr. Nolin's wife, false entries in trust ledgers, false statements of adjustments and false statements of trust funds and false statements of account. These records and documents were falsified for the purpose of presenting the payments as legitimate disbursements and to attempt to conceal the fraud against and theft from Mr. Nolin's employer, the Law Firm and the improper and unauthorized use of client trust funds for that purpose.

Facts

33. The relevant facts are admitted in the Admission of Facts dated August 8, 2008 and form part of the record.

34. Mr. Nolin was a member of The Law Society of Saskatchewan at all material times. He was called to the bar in 2000 and practised at law firm "A", the "Law Firm" until the 13th of February, 2008. As indicated in the charges, the thefts occurred on two separate real estate transactions and one criminal matter from trust funds from three separate clients, on September 21, October 19 and October 23, 2007.

35. The irregularities were discovered by the Law Firm on or before the 8th of November, 2007. Mr. Nolin was permitted by the Law Firm to continue to be employed subject to certain restrictions imposed by the Law Firm and supporting undertakings given by Mr. Nolin and the Law Firm to the Law Society. After Mr. Nolin left the employ of the Law Firm in February, 2008, he did not practise and gave an undertaking not to practise.

36. In each of these circumstances, the account to the client incorrectly described a disbursement as "agent's fees" or "commissions" when instead these payments were paid to the order of Mr. Nolin's wife in her birth name. In this way, each of the clients was deceived as to the use made from funds deposited into trust for another purpose. There was no agent's fee or commission legitimately payable to any third party. While the cheques were payable to Mr. Nolin's wife, they were deposited by him to a joint account that had not been used for many years by his wife. The funds were later accessed by him alone without the knowledge of his wife. He admitted he concealed the entirety of these transactions from his wife. This particular account was used to conceal the theft because it was never accessed by her.

37. At the Sentencing Hearing, Mr. Nolin suggested these payments were used to replace funds he had taken from a household account to meet pressing financial commitments he was concealing, at least in part, from his wife. In his submission to the Benchers he gave differing accounts of these commitments by first suggesting $2,600.00 and then suggesting $2,200.00 - $2,300.00. At the time, he was motivated to conceal these disbursements from his wife, the Law Firm and the clients involved. A percentage of the fees stolen from the Law Firm would have been paid to Mr. Nolin if they had been paid to the Law Firm as fees. The gross amount misappropriated from the Law Firm in the aggregate amount of $2,800.00 exceeded the amount Mr. Nolin stated was needed by any measure to replace funds taken from the household account held in his name and hers.

38. The trust irregularities committed by Mr. Nolin were discovered by members of the Law Firm. When Mr. Nolin was first questioned by one of the Law Firm's partners on the 8th day of November, 2007, he denied any wrongdoing. Within an hour of this interview he was questioned by a different partner of the Law Firm. He then admitted to the facts supporting the above described charges.

39. He returned the misappropriated funds to the Law Firm on or about the 19th of November, 2007 and self-reported the above described events by letter to the Law Society dated the 20th of November, 2007 after the Law Firm obtained an opinion on the matter, presumably urging Mr. Nolin self report to the Law Society.

40. Mr. Nolin told the Benchers that he and his wife had been experiencing difficulties in their marriage and had agreed to separate. Mr. Nolin was also suffering emotional problems of his own. One week before the theft was admitted, he experienced the first of what he described as two **"meltdowns"**. On the 1st of November, 2007, his wife signed their separation agreement. He became distraught, wept uncontrollably for four days and told his wife he was experiencing suicidal ideations. He was taken by his wife to be seen by his counsellor on November 5th. He stated he then accepted responsibility for his problems for the first time. On November 8, 2007 he attended a session with and received treatment from his counsellor followed by a meeting with a family member which he also suggested contributed to his stress. He returned to work late in the afternoon. As stated above, he was then confronted by one partner, and denied any wrongdoing. When confronted by another, he admitted everything. He went home and became what he described as "hysterical for one more reason". He was hospitalized for the night.

41. He told the Discipline Committee in his submissions that, when he was first approached by the Law Firm, the partner speaking to him was also his divorce solicitor and the approach caught him "off guard". He expressed regret for having lied to this lawyer. When he was approached by another member of the firm, described by him as a "mentor to me", he told the Discipline Committee:

> "I just can't lie to (this member), and I fessed up and said, I screwed up. This is what I did. I wasn't trying to harm the clients, and I don't think it makes a hill of a beans of difference who was harmed in the end result, whether it was the firm or the clients. It was out and out wrong".

42. Much was said by Mr. Bodnar and Mr. Nolin at the hearing about Mr. Nolin's state of mind, and how this should mitigate in his favour. This aspect of the evidence will be reviewed in the context of our analysis.

The Duty of the Lawyer

43. In discerning the duty of the lawyer, the guiding and first principles are established by the Code. Significantly, the first Rule speaks to the integrity of the lawyer in all relationships: Chapter I, entitled "Integrity" provides this simple statement of the Rule:

> The lawyer shall discharge with integrity all duties owed to the clients, the court, other members of the profession and the public.

44. As the commentary illustrates, the lawyer's integrity transcends and informs all other duties. The commentary under Chapter I provides, in part:

> 1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt about the lawyer's trustworthiness the essential element in the lawyer-client relationship will be missing. If personal integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.2
> 2. **The principle of integrity is a key element of each rule of the Code.**
>
> [...]
>
> 3. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession and the administration of justice as a whole.3 If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action.
>
> [Emphasis added]

45. While not purporting to be exhaustive, the Code provides the following Notes on the subject of integrity that apply here:

> 1. Cf. CBA-COD 1. *O.E.D.*: "Integrity...soundness of moral principle, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity, candour." Cf. IBA. "Introductory". "The rules of professional conduct enforced in various countries...uniformly place the main emphasis upon the essential need for

integrity and, thereafter, upon the duties owed by a lawyer to his client, to the Court, to other members of the legal profession and to the public at large."

2. "Integrity, probity or uprightness is a prized quality in almost every sphere of life.... The best assurance the client can have...is the basis integrity of the professional consultant.... Sir Thomas Lund says that...his reputation is the greatest asset a solicitor can have.... A reputation for integrity is an indivisible whole; it can therefore be lost by actions having little or nothing to do with the profession.... Integrity has many aspects and may be displayed (or not) in a wide variety of situations...the preservation of confidences, the display of impartiality, the taking of full responsibility are all aspects of integrity. So is the question of competence.... *Integrity is the fundamental quality, whose absence vitiates all others*." *Bennion, passim,* pp. 108-12 (emphasis added).
3. Illustrations of conduct that may infringe the Rule (and often other provisions of this Code) include:

[...]

(b) committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g., by knowingly making a false tax return or falsifying a document, even without fraudulent intent, and whether or not prosecuted therefor;

(c) making untrue representations or concealing material facts from a client with dishonest or improper motives;

[...]

(e) misappropriating or dealing dishonestly with the client's monies;

(f) receiving monies from or on behalf of a client expressly for a specific purpose and failing, without the client's consent, to pay them over for that purpose;

[...]

(h) failing to be absolutely frank and candid in all dealings with the Court, fellow lawyers and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights or disclosing the client's confidences; [...]

46. The Notes also speak to the privilege and trusted stature of a professional body and its membership:

4. Cf. IBA, Chapter 2.

"The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list." (p. 36). "Membership of a...professional body is generally treated as an indication of good character in itself...", *Bennion*, p. 111.

47. The integrity of the individual lawyer and the trusted status of the profession is a cornerstone of the solicitor client relationship. In *Adams v. Law Society (Alberta)*[28] the court considered an appeal from disbarment following the sexual exploitation of a vulnerable client. While the misconduct in *Adams* was distinctly unique from the case at hand, the principled discussion is apt. Writing for the court, Fraser, J. stated:[29]

> Historians may question the origin and the history of the oft-repeated statements about the honour and integrity of the legal profession, but it cannot be denied that the relationship of solicitor and client is founded on trust. That fundamental

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28 [2000] 11 W.W.R. 288 (AB C.A.) [*Adams*].

29 *Ibid.* at para. 10.

> trust is precisely why persons can and do confidently bring their most intimate problems and all manner of matters great or small to their lawyers. That is an overarching trust that the profession and each member of the profession accepts. Indeed, it is the very foundation of the profession and governs the relationships and services that are rendered. While it may be difficult to measure with precision the harm that a lawyer's misconduct may have on the reputation of the profession, there can be little doubt that the public confidence in the administration of justice and trust in the legal profession will be eroded by disreputable conduct of an individual lawyer.

48. The good reputation of the lawyer is founded on his or her integrity. The court in *Adams* quoted with approval from the Supreme Court of Canada's judgment in *Hill v. Church of Scientology of Toronto*[30] where Cory, J stated:[31]

> The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.

49. As the court in *Adams* concluded, every member is deemed to understand that his or her behaviour reflects upon the profession at large and must therefore stand to the scrutiny of others.[32]

Sentencing Factors and Principles

50. Mr. Nolin's counsel urged us to consider and follow the outcomes of earlier decisions of the Benchers of the Law Society of Saskatchewan in cases involving misappropriation. We were referred to the decisions of the Benchers in *Hagen*[33] and *Wilson*[34]. Each case involved a misappropriation. In each case a suspension with practice conditions was imposed. Since those decisions, the Benchers have not considered a case of misappropriation, but did impose the penalty of disbarment in a case involving a serious breach of integrity through a series of fraudulent transactions intended to conceal dilatory practise.[35]

51. We were also referred to considerable jurisprudence from other Societies involving misappropriation and where other Discipline Committees considered and imposed sanctions falling within the spectrum of suspension, permission to resign in the face of discipline and disbarment.

52. We recognize consistency in decision making as an important aspect of acting judicially in discipline matters. Consistency promotes public confidence in the Law Society's quasi-judicial function and jurisdiction over its members. Consistency is a hallmark of fairness in decision making. But legitimate consistency is not achieved by merely following outcomes in

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30 [1995] 2 S.C.R. 1130.
31 *Supra*, note 28 at para. 8.
32 *Ibid.* at para. 9.
33 Law Society of Saskatchewan Benchers Discipline Decision 03-04 decided June 10, 2003 [*Hagen*].
34 Law Society of Saskatchewan Benchers Discipline Decision 07-04 decided October 18, 2007 [*Wilson*].
35 *Rault*, *supra*, note 2.

similar cases where the decision is discretionary. In *R. v. Ingram*,[36] Cameron, J., as he then was, said this of the concept of *stare decisis* in the context of findings of fact and the application of judicial discretion:[37]

> 7 When it is said that a Court of inferior jurisdiction is "bound to follow a case" or "bound by a decision" of a Court of superior jurisdiction, what is meant, of course, is that a Judge is obliged to apply the ratio decidendi of the former decision to the facts before him unless the facts are distinguishable from those of the previous case. The ratio decidendi of a case generally is understood to be the rule of law expressly or impliedly treated by the Court as necessary to its conclusion. Decisions on facts do not constitute precedents. As Newlands J.A., in *Cameron v. C.P.R.*, 11 Sask. L.R. 277, [1918] 2 W.W.R. 1025 at 1026, 42 D.L.R. 445 (C.A.) observed:
>
> > In considering this case, I would first call attention to the remark of Finaly, L.C., at p. 359 [1917] A.C. that: '*a finding of fact in one case cannot be a safe guide as to a finding of fact in another case*', and to the remarks of Lord Dunedin, on pp. 364 and 365 ([1917] A.C.): [emphasis in original]
> >
> > > I should like to add that, though a decision of a Court of higher or equal authority binds another Court as to a proposition of law, it cannot bind them as to the findings of fact. No doubt if the facts of two cases are so similar as to be practically identical the second Court will hesitate long before it comes to a different conclusion. Nevertheless, the facts of two different cases cannot, *ex natura rei*, be actually identical, and it is never incumbent on a Court to import the finding of fact in one case into another.
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> 8 In *Douglas v. Addie*, 23 Sask. L.R. 463, [1929] 1 W.W.R. 610, [1929] 2 D.L.R. 401 (C.A.), Martin J.A., quoted with approval these observations of Lord Halsbury in *Quinn v. Leathem*, [1901] A.C. 495 at 506:: [sic]
>
> > ...there are two observations of a general character which I wish to make; and one is ... that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

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36 (1981), 12 Sask. R. 242 (Sask. Q.B.).

37 *Ibid.* at paras. 7 - 10.

> 9 **While that may be a rather narrow expression of the principles involved nevertheless it is instructive and it is clear that only a proposition of law will bind, not one of fact.** [emphasis added]
>
> 10 Where, as in this case, the statute provides its own complete, straightforward and unambiguous definition of what constitutes the offence and thus settles the law all that is left is to find the facts and arrive at a verdict. Other decisions of other Courts will of necessity be of only limited assistance; they may provide some useful guides but cannot bind for, by the very nature of what we are dealing with, they will turn on their own facts and not two cases will have identical facts. Each of these dangerous driving cases has to be decided on its own facts and in accordance with the clear directions of the section that *requires* the Court to have regard, to *all* of the circumstances, *including*, but not restricted to those mentioned in the section; were it otherwise we would be crossing from the realm of stare decisis into that of res judicata. I think, too, that it may be said accurately that in the context of precedent, a question which would be left to a jury if there were one, must be treated as a matter of fact. [emphasis in original]

53. Thus, a proposition of fact in one case cannot be elevated to a proposition of law in another as a matter of *stare decisis*. In matters of sentencing, where decisions are based on facts and the exercise of discretion in each case, it cannot be said that a given result must follow in each similar case as a matter of law. Instead, the broader objective of parity and proportionality in sentencing decisions is best achieved by an examination and application of the governing principles followed and the objectives promoted by sentencing bodies in cases involving similar misconduct. Indeed, the blind and rigid application of outcomes from one case to another, without due consideration of the underlying sentencing principles and objectives, would constitute a failure to act judicially.

54. There can be no doubt the rules of natural justice bind the Benchers in the exercise of their quasi judicial authority. In the balancing the members' rights, and the right of the public to be protected, the Benchers must accommodate a full and fair hearing, such that all legitimate interests are fairly represented and the Benchers' duty under the Act is fulfilled. But the Benchers have a further duty to be transparent in their reasoning and decision making process. The absence of transparency limits the scrutiny of the public, the member being disciplined, the membership at large and courts of appellate review. Richard Steinecke said this of the importance of publishing reasons:[38]

> The decision on sanction requires superb reasons. The reasons should explain to the practitioner, the profession, the public and the appellate court why the sanction was chosen. Not only does this make the decision more satisfactory and defensible, it achieves other important goals. Good reasons ensure that the decision is a sound one in the first place (if you cannot explain it, it probably was a bad decision). Good reasons educate the readers about the profession and its regulation.
>
> Good reasons ensure that when a future tribunal considers the reasons when determining the range of sanctions in a future case the precedent is given appropriate consideration. Failing to describe the nature of the misconduct fully

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38 Richard Steinecke, *Formulating Sanctions*, April 2006, Steinecke Maciura Leblanc Newlsetter No. 98.

> and accurately and omitting to give the aggravating and mitigating factors means that the decision will be misinterpreted.

55. The inclusion of reasons, by reference to the relevant sentencing principles and objectives also establishes a body of jurisprudence over time that will inform and assist future decision makers where appropriate. Without reasons, the importance of denunciation and the specific and general deterrence objectives of sentencing are limited. The public and members are left to their own inferences about how the public will be protected in future similar matters. For some, the failure to give reasons may raise an apprehension the decision is not well reasoned or formed. For others, it might create a perception that the reasons for disciplining a lawyer may only be known by other lawyers sitting as Benchers, thus contributing to an apprehension of institutional superiority or conflict of interest. The more cynical observer might conclude the failure to give reasons reflects a reluctance to be transparent and accountable. Where the reasoning and decision making process is lacking in transparency, the intelligibility of the process and the legitimacy of the outcome cannot be scrutinized in the context of the prevailing social and political conditions of the day.

56. The responsibility for sentencing should be exercised in terms that are consonant with evolving societal values. In *Rault*, the Benchers discussed this responsibility in the context of earlier precedent:[39]

> The Benchers are burdened with complete and absolute discretion to determine what constitutes conduct unbecoming, and must do so in a changing legal, political and social context. Where there has been a finding of conduct unbecoming, the Benchers alone determine the appropriate sanction. Both determinations are discretionary and are informed by, but not strictly bound to, earlier precedent. Each case is decided on its own merits, according to the discretion of the Benchers.

57. In *Adams*, the Alberta Court of Appeal considered the relevance of other decisions in the context of society's tolerance of sexual misconduct and related breach of trust between lawyers and clients. The Court suggested the exercise of discretion in sentencing matters should be in step with current societal values. The Court said:[40]

> [...] We acknowledge that considering the dispositions in disciplinary matters in other cases and in other jurisdictions can be helpful. **But this assessment must be undertaken with due respect to contemporary values in Canadian society**. In this regard, we observe that in the past, there has sometimes been a tendency to minimize and excuse misconduct of a sexual nature between the members of some professions and their clients. Further, and in any event, because the relevant facts vary greatly from case to case, care must be taken to consider each complaint in the context of its particular circumstances. [...] [emphasis added]

58. For all these reasons, the Benchers should be cautious about simply referencing and following outcomes in earlier decisions. Consistency and fairness is best achieved in the application of similarly reasoned principled decisions reflecting the legitimate objectives of the sentencing power and responsibility. Likewise, where an earlier precedent seems incorrect in

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39 *Supra*, note 2 at p. 3.
40 *Supra*, note 28 at para. 27.

approach or result, this should not be compounded by a similar approach or outcome in other cases.

59. Thus, the Benchers are not bound by mere outcomes in earlier decisions. While each case must be decided on its own facts and merits, each decision must also withstand the scrutiny of others, including the Benchers. Where a previous decision does not appear to support the Law Society's paramount mandate to protect the public, such decisions cannot bind Discipline Committees to a similar outcome.

60. Benchers have a positive and paramount duty to protect the public in each case coming before them and the jurisprudence created by their decisions over time. In sentencing decisions, Benchers are not bound by the joint submissions of counsel. The Hearing Committee in *Peet*[41] expressed caution in accepting a joint submission when imposing sentence:[42]

> In considering a joint submission, a Hearing Committee should not reject it, in our opinion, unless "the joint recommendation fails to properly recognize the paramouncy of the objective of general deterrence to protect the public..." (see Law Society of Manitoba v. MacIver, [2003] L.S. D. D. No. 29 at page 8 para. 34).

61. For these reasons, the Discipline Committee in *Rault* applied its judgment independent of the joint submission. The Discipline Committee rejected the joint submission and held that disbarment was required to sustain the public's confidence in the profession's ability to govern itself.[43]

62. As the pre-amble to this decision indicates, this responsibility is exclusive to the Benchers and is subject only to appellate review where they have committed an error of approach. Where their approach is sound, the Benchers alone are solely responsible for exercising their discretion to protect the public. They must not abdicate this responsibility by blindly following earlier precedent in conflict with this duty.

63. The previous decisions in *Hagen* and *Wilson* contain few reasons. In *Hagen*,[44] the written reasons articulate a broad reference to sentencing principles, but no attempt is made to articulate their relative weight or importance, or how those objectives are fulfilled in the sanction imposed. In *Wilson*[45], the reasons merely reference the trust and confidence the public expects of lawyers and the need in that case for censure. But *Hagen* and *Wilson* do not allow us to evaluate the reasoning, and weighting of sentencing options from a principled perspective. While we do not propose to revisit the merits of those decisions, it is sufficient to observe there is no indication in either decision the Benchers followed the well-settled juridical approach of determining whether there are circumstances that legitimately mitigate against the general rule of disbarment in cases of theft and fraud. In the absence of additional reasons in either decision, the precedential value is less helpful than the many other authorities where other Discipline

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41 Law Society of Saskatchewan Benchers Discipline Decision 08-05 decided October 27, 2008 [*Peet*].
42 *Ibid.* at para. 9.
43 *Supra*, note 2 at p. 13.
44 *Supra*, note 33.
45 *Supra,* note 34.

Committees explicitly considered and applied this approach in cases involving misappropriation and fraud.

64. The mainstream of the jurisprudence referred to us from other jurisdictions by counsel for the Law Society suggests a general rule that disbarment should be imposed in misappropriation cases, unless exceptional circumstances exist. We were not referred to any other decisions in which this approach in these authorities was rejected in principle. We also found this approach to have been discussed at length and followed in the decision of the *Barristers' Society (Nova Scotia) v. Steele*[46] and its Order and Decision dated September 18, 1995.

65. In *Steele*, where the authorities were extensively reviewed, the Discipline Committee there quoted with approval from Gavin MacKenzie and his text "Lawyers and Ethics: Professional Responsibility and Discipline" where the Committee, at page 4, quoted from the learned author:[47]

> It would be a mistake, however, to assume that disbarment is a penalty preserved for cases that combines the worst imaginable offense with the worst imaginable offender. In cases involving fraud or theft, in spite of evidence of prior good character and financial or other pressures, lawyers are almost certain to be disbarred. In one such case, a discipline hearing panel held that "disbarment is as much required for the lawyer who throws away a hard-earned reputation for integrity as it is for the scoundrel who caps a disreputable career with more of the same." Thus the profession sends an unequivocal message in the interest of maintaining public trust and the reputation of the profession.
>
> An informal survey of 83 misappropriation cases in Ontario between 1980 and 1988 disclosed that 67 (81 percent) resulted in disbarment, 12 (14 percent) resulted in the lawyer being granted permission to resign, three (four percent) resulted in suspension, and one (one percent) resulted in reprimand in Convocation. Discipline hearing panels have frequently held that acts of misappropriation should result in disbarment unless exceptional extenuating circumstances exist. An order of disbarment in such cases is made to preserve public confidence, to protect the public, and to deter other lawyers from breaching the trust of their clients.

66. The Alberta Court of Appeal said much the same in *Adams*:[48]

> It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that the proposition has been rejected in criminal cases for the same reasons it should be rejected here. It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers.

67. Having reviewed these and the other authorities referred to us by Mr. Plaxton we accept this approach as one that appropriately reflects and protects the public interest. A serious breach of the lawyer's duty of integrity brings into question his or her suitability to

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46 [1995] L.S.D.D. No. 261 [*Steele*].
47 *Supra*, note 26 at p. 26-46.
48 *Supra*, note 28 at para. 11.

practise. While the inquiry is focused on how the lawyer's integrity is manifest in behaviour, in each case, certain categories of misconduct are inherently and fundamentally dishonest. In cases of fraud and misappropriation, such behaviour is incompatible with the integrity and probity expected of lawyers. We find ourselves well served by a succinct statement of the rule from the Law Society of Upper Canada in *Clark*[49] and referred to at paragraph 12 of the *Dyer*[50] matter:

> The general rule in misappropriation cases, cited time and time again, is that save in unusual circumstances, disbarment is required.

68. What may constitute a circumstance mitigating against disbarment will be discussed in our analysis to follow.

Analysis

69. In this case, the misconduct involved theft, concealed by fraud. The mechanism involved the theft of funds from Mr. Nolin's firm and employer to whom he was in a position of trust and owed a fiduciary duty. The theft was accomplished through the use of and misappropriation of trust funds held for the benefit of the firm's client. While the fee charged to the client was reduced correspondingly, such that there was no loss to the client, the client's funds and interests became the means by which the fraud and theft was committed against the firm. In this way, the clients' funds were used for a purpose contrary to what was intended and authorized by the client.

70. As counsel for the Law Society suggested, there were two aspects to the member's misconduct. The first involved the use of fraud through the creation of fraudulent accounts and firm records, including trust account records, to disguise disbursements paid from trust for the member's benefit as legitimate file disbursements. This scheme involved several steps including the production of false statements and false entries to firm records. The second aspect of the misconduct involved the unauthorized use of client funds received from the client in trust to be applied for specified and legitimate purposes. While the client did not suffer any loss, the diversion nonetheless constituted theft by the inappropriate use of the clients' funds. By these means, Mr. Nolin stole $2,800.00 from the Law Firm. If these amounts would have been paid to the Law Firm as fees, a portion would have been paid to Mr. Nolin. Mr. Nolin did benefit by taking the entire amount for himself with no plan to repay or account to the Law Firm.

71. We were urged to regard the theft lightly as Mr. Nolin meant no harm to his clients and the funds were replaced. The Law Firm stated it was "not requesting Mr. Nolin be suspended". We were reminded the matter was only reported to the Law Society by Mr. Nolin when the Law Firm obtained a legal opinion presumably suggesting the irregularity be reported. Mr. Nolin's counsel argued this was a matter between Mr. Nolin and the Law Firm that did not involve the clients or the public and it was therefore not necessary for the Benchers to act further to protect the public.

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[49] The Law Society of Upper Canada Ontario Discipline Committee in the matter of Peter David Clark, decided on September 13, 1996.

[50] The Law Society of Upper Canada Ontario Discipline Committee in the matter of William Thomas Dyer, decided on October 29, 2004.

72. We disagree with the focus of this submission. This proceeding is before us because the public interest requires a sanction for conduct unbecoming. It is not a private dispute where a victim or complainant has the standing to compromise the process of the discipline prosecution. While the impact on the victim may be a mitigating or aggravating factor, the imperative and paramount objective of the sentencing process is the protection of the public. This duty extends to promoting the public's confidence in the legal profession's ability to govern itself in the public interest.

73. In *Merchant No. 2*, the Saskatchewan Court of Appeal quoted with approval from McDonald J. in *Witten, Vogel Binder & Lyons v. Leung et al,* in part:[51]

> [...] It is in the public interest that this confidence be maintained. **This concern merits paramountcy over any effect that judicial measures taken to ensure maintenance of that confidence may have upon the legal or equitable rights and obligations of the solicitors' clients or those of other persons.**

74. The Alberta Court of Appeal stated in *Adams*:[52]

> 6 [...] A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

75. The inquiry therefore does not begin and end with an examination of the impact on the victim. Instead, the appropriate focus is on the conduct of Mr. Nolin, how such conduct manifests his character and whether he is of sufficient good character and integrity that the public, and its confidence in the profession, is protected by allowing him the privilege of practicing.

76. A decision of a Discipline Committee to simply defer to a victim's suggestion for leniency would not represent the legitimate exercise of governance in the public interest. Where the lawyer's character is such that he or she is not trusted and fit to practice law, the public interest and confidence must be protected. As discussed above, the burden, responsibility and privilege of self governance accords with the deference to and autonomy of the Law Society's right to self govern. In the balance, the public interest is paramount. In this case, the misconduct involved fraud, theft and the breach of a fiduciary duty to the member's client and employer. In its essence, the misconduct in this case is a fundamental breach of the member's duty of integrity and fidelity requiring serious censure and deterrence commensurate with other acts of fraud and misappropriation.

77. We were asked to accept that the member's personal and family circumstances were so exceptional as to mitigate against disbarment, such that a less serious sanction, such as suspension, would be appropriate. We are also mindful that the sentencing process is not primarily punitive and is instead intended to maintain public confidence in the profession and its ability to govern. MacKenzie stated:[53]

> In a 1993 English decision, the Court of Appeal held that because the main purpose of imposing penalty in discipline cases is not punishment, but rather the

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51 *Supra*, note 10 at para. 70.
52 *Supra*, note 28 at para. 6.
53 *Supra*, note 26 at p. 26-45.

> maintenances of public confidence in the profession, mitigating circumstances are entitled to less weight than they would be in a criminal case.

78. Most recently, the Saskatchewan Court of Appeal suggested in *Merchant No. 2* that the sentencing process must consider the public confidence in the reputation of the profession:[54]

> [...] However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman,* the Law Society Appeal Panel considered the philosophy of sentencing in the disciplinary matters and its unique considerations. The panel quoted extensively from *Bolton v. Law Society.* The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:
>
> [74] A criminal court judge... is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the acused licensee's peer group--the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law soceity's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

79. In determining what constitutes a mitigating and exceptional circumstance, we were urged by counsel for the Law Society, and the authorities cited by him, to apply the "but for" test enunciated in *Zinkhoffer*[55]. In *Zinkhoffer*, the Committee concluded the member was suffering from depression and that the misconduct complained of would not have occurred, but for his depression. Quoting again from MacKenzie, the Committee in *Steele*, put the test of mitigation in this context this way:[56]

> Alcoholism, drug addiction, stress caused by financial and matrimonial difficulties, and mental illness are common factors in discipline cases and are material to the assessment of penalty in cases **where a causal relationship exists** between the lawyer's condition and the misconduct being considered. ... [emphasis added]

80. In *French v. Law Society of Upper Canada (No. 2),*[57] the Ontario Supreme Court was asked to review a decision of the Discipline Committee where the Committee was:[58]

> [...] not satisfied that the evidence of the two psychiatrists established that the misappropriations of the Solicitor were made at a time when the Solicitor's

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54 *Supra,* note 10 at para. 98.
55 QL Citation 2000 (AJ No. 109) [*Zinkhoffer*].
56 *Supra,* note 26 at p. 26-44.
57 (1973), 41 D.L.R. (3d) 23 (Ont. S.C.).
58 *Ibid.* at para. 34.

> health was such that he would not know that what he was doing was wrong and the Committee felt that this medical evidence went no further than to indicate it would affect, in some measure, the judgment of the Solicitor when he took trust funds from his clients' accounts.

81. While the reviewing court held that a state of mind might not establish a legal defence to a charge of conduct unbecoming, it might merely constitute a "state of diminished responsibility" and therefore be considered in the question of penalty.[59]

82. The court did not expressly enunciate a "but for" test, but does seem to suggest that the onus or external event should compromise the *mens rea* of the member, such that the misconduct does not reflect his true character, that his responsibility is thereby diminished and that the sanction should be adjusted accordingly.

83. Gavin MacKenzie has generally observed a necessary nexus between misconduct and external factors that legitimately mitigate against a serious sanction.[60] MacKenzie has also noted that other Discipline Committees have held that a legal defence of insanity may be available if it can be established that, by reason of a disease or the mind, the lawyer was incapable of appreciating the nature of his or her act or the fact it was wrong.[61] In each of these decisions the panel applied a "but for" test and held that the evidence did not establish a sufficient nexus.

84. In this case, Mr. Nolin pled guilty to both charges of conduct unbecoming. He did not enter a legal defence to the charges based on his state of mind. He did suggest in his evidence and submissions that his state of mind ivolved a state of diminished responsibility, and that this should mitigate in his favour on the question of sentence.

85. In applying the causal relationship test to the mitigating factors raised by Mr. Nolin, we are not satisfied there is a causal connection between the mitigating factors and his behaviour. While we are satisfied his personal and family difficulties were such that he was emotional and highly motivated to steal from his employer, we are not satisfied these circumstances contributed to a state of mind for which he should not be held fully responsible.

86. The expert evidence filed on Mr. Nolin's behalf suggests an emotional or psychological condition stemming from life experiences largely beyond Mr. Nolin's control. But there is no suggestion in this evidence that Mr. Nolin lacked the clarity of thought and good judgment to appreciate his actions were wrong and incompatible with the public's expectation of integrity and good character and whether he is therefore fit to practise law. There was no evidence that the diagnosis of depression, of itself, negated his moral consciousness and ability to know that fraud and theft is wrong. Indeed, the forethought, planning and execution of the repetitive fraudulent scheme, in a series of three discrete files suggests a consciousness and clarity of thought consistent with an intention to steal for monetary gain and to also devise a scheme to prevent its discovery. The preparation of cheques to his wife's maiden name and the use of an

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59 *Ibid.* at para. 44.

60 *Supra*, note 26 at p. 26-44.

61 *Ibid.* at p. 26-44, see footnote 149; see *Re: Perrault* report of the Law Society of Upper Canada Ontario Discipline Panel adopted by Ontario convocation on May 28, 1989; and *R e: Stewart* report of the Law Society of Upper Canada Ontario Discipline Panel adopted by Ontario convocation on June 28, 1898.

old bank account was a sophisticated aspect of a plan to conceal. The intent to form a plan to conceal is also consistent with an appreciation his actions were wrong.

87. Mr. Nolin's counsel argued that this conduct is an aberration of Mr. Nolin's character, and that he should therefore not be sanctioned to the same degree as in other cases of misappropriation and fraud. As is often the case where fraud occurs, the fiduciary relationship created the means and opportunity to commit the theft. Where the conduct of a lawyer objectively brings his character and integrity into question the Benchers should treat subjective evidence of good character with caution. Mr. Nolin's counsel provided several reference letters from other members of the Law Society, attesting to the good character and other positive attributes of Mr. Nolin. Mr. Bodnar himself attested to Mr. Nolin's laudable qualities as a barrister. But such evidence should be considered and weighed against the whole of the evidence relating to the risk of the recurrence. Gavin MacKenzie put it this way:[62]

> Some types of evidence in mitigation of penalty are more reliable indicators of the likelihood of recurrence than are others. Character evidence is common and can be persuasive, but it is much less valuable if the witnesses are not fully informed of the facts. Even then, it is difficult to gauge the extent to which the evidence is affected by factors such as friendship. Virtually all lawyers are responsible for some good deeds, and virtually all are held in high esteem by some other lawyers and clients. The discipline hearing panel must ensure that the process is not transformed from a deliberative process into a referendum among members of the profession.

88. As Gavin MacKenzie and other writers have observed, integrity is an essential aspect of good character and the suitability to responsibly practise law. Where the character of the lawyer is incompatible with membership he will not be allowed to practice. Stuart Thom, Q.C., while Treasurer of The Law Society of Upper Canada, said:

> The Society's disciplinary action is to protect the public directly and profession indirectly from further misfeasance by erring lawyers. The lawyer is disbarred or suspended because he is regarded as unfit to practice.

89. The privileges of membership at the bar are not intended to punish those who might be excluded by the good character requirement of membership. The rule reflects the requisite element of integrity and is intended to proactively protect the public. As Mackenzie stated:[63]

> The purposes of the good character requirement are the same as the purposes of professional discipline: to protect the public, to maintain high ethical standards, to maintain public confidence in the legal profession and its ability to regulate itself, and to deal fairly with persons whose livelihood and reputation are affected.
>
> These purposes are commendable and there can be no doubt about the relevance of the good character requirement to the practice of law. The law is concerned with the questions of right and wrong, and fairness and unfairness. At least the law has replaced religion as our primary moral touchstone.

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62 *Supra*, note 26 at p. 26-45.
63 *Ibid.* at p. 23-2.

> The requirement that lawyers must be of good character finds expression also in what is in most jurisdictions not coincidentally the first rule of professional conduct: lawyers must discharge with integrity all duties owed to clients, and court, the public, and other members of the profession. "Integrity," the first commentary to this rule says, "is the fundamental quality of any person who seeks to practise as a member of the legal profession."

90. A lawyer's good character is legitimately brought into question where his or her conduct objectively demonstrates a breach of the integrity requirement. Factors mitigating against suspension or disbarment must therefore establish that the lawyer's character is nonetheless such that he or she may still be trusted and may therefore be allowed to practice law. Evidence a lawyer is motivated by external circumstances to commit fraud and theft does not, by itself, diminish his accountability. The public rightfully expects to trust lawyers under the most challenging circumstances.

91. In his discussions of factors mitigating against disbarment, MacKenzie said this:[64]

> Evidence that a lawyer's misconduct occurred during a period of stress caused by financial or matrimonial pressures may also be of doubtful value in mitigation of the penalty. The fact that lawyers yield to temptation while under stress may, indeed, be regarded as a sign that they lack the moral strength necessary to be lawyers. As an Ontario discipline committee states in a 1995 case, **"[i]t is exactly when the stresses are greatest, when compliance with our profession's rules of conduct are most difficult, that members must faithfully hew to the line. Those are the times when lawyers must be worthy of being 'trusted to the ends of the earth', no matter what difficulties they face."** [emphasis added]
>
> Neither the fact that a lawyer has a heavy workload nor the fact that a lawyer relied on employees should be compelling mitigating factors, because both are within the lawyer's control.
>
> Other factors may, nevertheless, suggest strength of character in ways germane to a lawyer's ability to function responsibly in practice. The fact that a lawyer has made restitution is always relevant (except perhaps in cases in which it has been effected by the exercise by the victim of a right of set-off or other legal process), but it is much more likely to be indicative of a genuinely altered attitude if made prior to discovery by the law society of the lawyer's misconduct. Similarly, a lawyer who voluntarily discloses wrongdoing to the law society before it learns of the lawyer's misconduct -- and before it has become inevitable that the misconduct will come to light -- may properly be regarded as a more suitable person to continue in practice than one who merely co-operates with the law society after it uncovers misconduct as a result of the initiatives of others.

92. In examining the issue of mitigation, it is important therefore to consider the whole of the evidence and to draw such inferences involving character and integrity as are objectively reasonable from Mr. Nolin's behavior, including his misconduct.

93. The evidence is that, when these acts were committed, Mr. Nolin was apparently functioning as a practitioner. There was no evidence or suggestion that he was identified by

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64 *Supra,* note 26 at p. 26-45 – 26-46.

anyone in his firm or family as so infirm that he lacked the ability to discern right from wrong or to make the many other important decisions required in the day-to-day practice of law.

94. Much of the expert evidence, and the explanations offered by Mr. Nolin himself, centred around the events precipitating his breakdown after his wife signed a separation agreement on November 1, 2007 and his firm's discovery of the theft and intervention on November 8, 2007. But by then, he had already committed and carried out three distinct thefts over a period of one month as part of a plan to misappropriate the trust funds for his own benefit, and to conceal such misappropriation through fraud. This was not a singular impulsive theft borne of fortuitous opportunity. Instead, it was a scheme devised to avoid detection, using the trust of his employer and the trust or naïvety of his clients as providing the opportunity for concealment.

95. The theft occurred on September 21st, October 19th and October 23, 2007. It is reasonable to infer that the plan to carry out these thefts was in place sometime before then. While he admitted he first took responsibility for his personal problems in a meeting with his counsellor on November 5, 2007 and had his first EMDR session on November 8, 2007 he was not forthcoming about the theft at that time. When he was initially confronted by one member of the Law Firm he denied any wrongdoing. This attempt to conceal his misconduct suggests he was aware he had done something wrong and had something to hide. Mr. Nolin acknowledged that he knew when he admitted his wrongdoing to another lawyer at the Law Firm on November 8, 2007 he had "screwed up", and that what he did "was wrong".

96. There was never any suggestion by Mr. Nolin, or his counsel, that he did not understand the consequences of his actions, or appreciate they were wrong at the time they were committed. Mr. Nolin did suggest in his submissions to the Discipline Committee that he had been suffering emotional and related difficulties for some time and was having difficulties in his marriage but wanted to reconcile with his wife. He was motivated to conceal the use of common funds to preserve the hope of reconciliation with his wife. There was no suggestion in the report from his counsellor or in Mr. Bodnar's submissions that any of these circumstances clouded his thinking or judgment, such that he did not understand the seriousness or inappropriateness of his misconduct, at the time the scheme was carried out.

97. While he had been seeing his counsellor since June of 2007, he had kept his problems within himself until he was forthcoming with his counsellor on November 5, 2007 about the need to deal with his problems. He was diagnosed by his counsellor as suffering from "acute, chronic depression" at some point in 2007. There was no evidence that this diagnosis was made before the fraudulent scheme was implemented. He did not receive therapeutic counselling until he asked for help from his counsellor on November 5th and received his first EMDR session or treatment November 8th. As indicated, this was after the thefts were committed between September 21st and October 23, 2007.

98. In his submissions to the Discipline Committee, Mr. Nolin stated he was in a "deluded state" and felt entitled to a bonus that had accrued, but had not yet been paid. But he also admitted he knew the bonus had not yet accrued and that he had not planned far enough ahead to settle up with the firm when it was paid stating "I never thought that far ahead". This is the only reference or suggestion in the evidence or submissions to a delusion. But there is no suggestion or evidence it overcame or otherwise influenced his thought process such that he did not know

right from wrong at the time the thefts were planned and committed. His own evidence suggested his mental state was most seriously compromised during what he described as the "two meltdowns" occurring after November 1st and November 8, 2007. Even then, he initially denied his wrongdoing, thus indicating he knew he had something to hide. He then demonstrated the clarity of good conscience when he ultimately admitted the theft was wrong on November 8, 2007. It is clear he was highly motivated, to take funds not belonging to him. But there is no convincing evidence his state of mind was so altered as to compromise his understanding of right from wrong.

99. More specifically, there is no expert or other evidence that the diagnosis of depression would have compromised Mr. Nolin's ability to understand his actions were fraudulent and incompatible with his duty of integrity and probity as a lawyer. Upon on a careful review of the only expert evidence filed on his behalf from his counsellor, there is no suggestion of any delusion or other limitations to his insight and judgment. The report from his counsellor in evidence only references a diagnosis of "acute, chronic depression". The report does not reference any emotions or behaviors consistent with delusions. Indeed, Mr. Nolin appeared to continue to practise as a lawyer throughout the relevant time, without there being any evidence of any limitation in his ability to effectively manage the intellectual and emotional challenges of the day-to-day practise of law.

100. When first approached by his employer about the suspicious disbursements, he denied any wrongdoing on his part. When he was pressed again by another lawyer representing his firm, he confessed. While Mr. Bodnar urged us to remember that this confession occurred within an hour of his initial denial, Mr. Nolin explained on the record that, because of his personal relationship with the second lawyer to approach him, he "could not lie" to him. There was no suggestion by Mr. Nolin himself that he was moved by his own conscience to confess. The record of the hearing before the Discipline Committee also shows that he did not self report until the Law Firm obtained an opinion, presumably suggesting he should. Mr. Nolin's evidence did not leave the Discipline Committee with the confidence that Mr. Nolin would have self-reported in any event, or that he would not have repeated the scheme again until caught.

101. This case is a clear example of misappropriation and fraud. The seriousness is compounded by the planning and forethought required to carry out a scheme of three separate transactions, each involving client funds misappropriated by a series of fraudulent acts designed to mislead and conceal. When confronted, Mr. Nolin denied any wrongdoing and attempted to mislead and conceal his misconduct from his employer. He was ultimately forthcoming, but only in the face of inevitable discovery. He breached the trust reposed in him by his clients and the Law Firm.

102. His actions involve a fundamental breach of the lawyer's duty of integrity. A serious sanction is required to generally and specifically denounce and deter any serious breach of integrity. The general rule of disbarment in cases of fraud and misappropriation may yield to exceptional and extenuating circumstances, but only where the evidence has shown that the lawyer's character is not objectively manifest in his or her behavior, and that he or she can still be trusted. A failure to act with integrity during stressful circumstances is an insufficient justification for these purposes, for the public must have confidence in a lawyer's integrity

during difficult times. Where a lawyer's behavior is manifestly lacking of integrity, he or she does not meet the standard the public rightfully expects of all lawyers.

103. Where a lawyer's behavior is incompatible with this standard he or she is therefore unsuited for membership. It is not sufficient therefore to suspend his or her right to practise, while maintaining membership. In those cases, as in this case of fraud and misappropriation, nothing less than disbarment is the appropriate response.

104. We are mindful that disbarment is the most serious sanction. Disbarment strips a member of his or her identity and status as a lawyer. The public admonition and stigma may endure beyond the effective term of the disbarment. A vocation is lost, perhaps irretrievably. As MacKenzie observed:[65]

> Despite the current absence of medieval physical consequences, disbarment is a sanction that, in addition to the loss of one's license to practise, still carries a significant stigma. The Ontario Divisional Court has described disbarment as the professional equivalent of capital punishment. The impact of disbarment on particular lawyers varies: for some, it means only the cancellation of a license to practise law; for others, it means the loss of identity. One former lawyer said that for him, being disbarred was far worse than going to jail: "The law was really a jealous mistress for me."

105. We have given serious consideration to these aspects of the sanction. But in the exercise of the Law Society's responsibility of self governance, the duty to protect the public and the public's confidence in the legal profession's ability to govern itself is paramount. It must be remembered that the identity of lawyers generally is shaped by their collective conduct and reputation. Their unfailing integrity is the core of their identity as members of the trusted legal profession. An individual lawyer may only sustain his or her identity as members of the profession if he or she maintains the highest standard of integrity. If his or her conduct in all the circumstances shows that he or she cannot be trusted, the lawyer does not meet the requisite standard of integrity and is therefore not suited for membership.

106. As indicated above, we are not satisfied a causal relationship between Mr. Nolin's misconduct and the factors raised by him in mitigation is such that he should not be held fully responsible. To the contrary, the evidence shows that he knew at all relevant times that his actions were wrong and incompatible with the trust given to him by his clients and the Law Firm. We therefore find no legitimate reason to depart from the general rule of disbarment.

107. Mr. Nolin does present some potential for reform. He has insight into his personal problems. He has the support of his family, peers and his counsellor. He still enjoys the high regard of colleagues who spoke well of him in their letters of support.

108. The Benchers do not have the power under *The Legal Profession Act, 1990* to permanently disbar a member with no right to re-apply. They do have the power to determine a minimum period of time before which a member may apply for re-admission, provided that such

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[65] *Supra*, note 26 at p. 26-46

actions were wrong and incompatible with the trust given to him by his clients and the Law Firm. We therefore find no legitimate reason to depart from the general rule of disbarment.

107. Mr. Nolin does present some potential for reform. He has insight into his personal problems. He has the support of his family, peers and his counsellor. He still enjoys the high regard of colleagues who spoke well of him in their letters of support.

108. The Benchers do not have the power under *The Legal Profession Act, 1990* to permanently disbar a member with no right to re-apply. They do have the power to determine a minimum period of time before which a member may apply for re-admission, provided that such period of time shall not exceed 5 years. After being disbarred, the member is not re-admitted as a matter of right and must still demonstrate he or she is suited for membership at the bar.

109. In this case, the prospects for reform are such that a lengthy bar against an application for readmission is not required to protect the public interest.

Decision

110. It is therefore the decision of this Discipline Committee that Mr. Nolin be disbarred without eligibility to apply for re-admission until 1 year from the date of this decision.

111. There is no order as to costs.

Penalty

112. It is ordered that Mr. Nolin is disbarred and not eligible for re-admission until one (1) year from the effective date of this decision.

DATED at the City of Regina in the Province of Saskatchewan this 1st day of April, 2009.

Per: _____

Paul H.A. Korpan, Q.C.
Discipline Committee Chair

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF MICHAEL NOLIN, OF SASKATOON, SASKATCHEWAN, A LAWYER

Decision #08-04

REPORT OF THE HEARING COMMITTEE

Hearing Committee Members: Eileen V. Libby, Chair, Karen Topolinski and George Patterson

Investigation Committee Counsel: Drew Plaxton

Member's Counsel: Morris P. Bodnar, Q.C.

Member: Michael Nolin

1. The Hearing Committee convened on August 28, 2008 in Saskatoon, Saskatchewan via telephone conference. Mr. Drew Plaxton represented the Law Society of Saskatchewan. Mr. Morris Bodnar, Q.C. represented the member, Michael Nolin, who was also present.

2. At the outset of the hearing, counsel for the parties acknowledged and agreed to the constitution and jurisdiction of the Hearing Committee. Counsel for the Investigation Committee tendered the Complaint and Notice of Hearing, and agreed Admission of Facts and the referenced documents together with a Formal Complaint (Amended) as Exhibits P-3, P-2 and P-1 respectively. With Mr. Bodnar's consent, these documents were made Exhibits in this proceeding.

3. The Formal Complaint alleges as follows:

   THAT Michael D. Nolin, of the City of Saskatoon, in the Province of Saskatchewan:

   1. Is guilty of conduct unbecoming a lawyer, in that he did misappropriate the sum of $1,000.00 from funds held in trust on behalf of a client E.B.;

      Reference Chapter I of the *Code of Professional Conduct*.

   2. Is guilty of conduct unbecoming a lawyer, in that he did misappropriate the sum of $800.00 from funds held in trust on behalf of a client D.W.;

      Reference Chapter I of the *Code of Professional Conduct*.

   3. Is guilty of conduct unbecoming a lawyer, in that he did misappropriate the sum of $1,000.00 from funds held in trust on behalf of a client C.E.;

Reference Chapter I of the *Code of Professional Conduct*.

4. Is guilty of conduct unbecoming a lawyer, in that he did prepare, or cause to be prepared, documents including accounting records, cheques and trust statements each of which contained information which was false;

   Reference Chapter I of the *Code of Professional Conduct*.

5. Is guilty of conduct unbecoming a lawyer, in that he made representations to the Law Society of Saskatchewan which were false and made in such a way as to mislead the Law Society of Saskatchewan.

   Reference Chapter I of the *Code of Professional Conduct*.

6. Did prepare, or cause to be prepared, documents including accounting records, cheques and trust statements each of which contained information which was false.

4. By agreement of the parties, the hearing proceeded on the basis of an Amended Formal Complaint, which alleges as follows :

THAT Michael D. Nolin, of the City of Saskatoon, in the Province of Saskatchewan:

1. [Original subsumed in Count Number 1]

   [New**] Is guilty of conduct unbecoming a lawyer, in that he did misappropriate certain sums from funds held in trust on behalf of clients, particulars of which are:**

   (a) The sum of $1,000.00 from funds held in trust on behalf of a client E.B.;

   (b) The sum of $800.00 from funds held in trust on behalf of a client D.W.; and

   (c) The sum of $1,000.00 from funds held in trust on behalf of a client C.E.

2. [Subsumed in Count Number 1].

3. [Subsumed in Count Number 2].

4. **Is guilty of conduct unbecoming a lawyer, in that he did prepare, or cause to be prepared, documents including accounting records, cheques, trust statements each of which contained information which was false;**

5. [Withdrawn].

5. A plea of guilty was entered as to counts 1 and 4 of the Amended Formal Complaint, which have been delineated in bold lettering above.

6. It is the decision of the Hearing Committee that the allegations as set out in counts 1 and 4 of the Formal Complaint (Amended) are well founded. Pursuant to section 51 of *The Legal Profession Act, 1990* the Hearing Committee finds that the complaints are well founded as revealed by the Admission of Facts.

7. The Hearing Committee makes no sentencing recommendation and refers the matter to the Benchers of the Law Society of Saskatchewan at the convocation of their choosing, for sentencing to be concluded.

8. The member confirmed through his counsel that he will continue to abide by his undertaking to cease the practice of law until further disposition of the within matter by the Benchers.

DATED at Regina, Saskatchewan this _____ day of September, 2008.

_____
Eileen V. Libby, Chair

DATED at Saskatoon, Saskatchewan this _____ day of September, 2008.

_____
Karen Topolinski

DATED at Moose Jaw, Saskatchewan this _____ day of September, 2008.

_____
George Patterson

Exhibit D-2
Date Aug 28 08
Lisa MacDonald
Official Court Reporter

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF
Michael D. Nolin, of Saskatoon, Saskatchewan
A LAWYER

ADMISSION OF FACTS

The member, Michael D. Nolin, of Saskatoon, Saskatchewan, hereby admits the following facts:

1. Michael D. Nolin (hereinafter "Mr. Nolin") is and was at all times material, a member of the Law Society of Saskatchewan, practicing in Saskatoon, Saskatchewan.

2. At the times material to the matters within and until approximately the 13th of February 2008, Mr. Nolin practiced as an associate with the law firm of Cuelenaere, Kendall, Katzman and Watson (hereinafter "the firm") in Saskatoon, Saskatchewan.

3. A summary of Mr. Nolin's previous dealings with the Law Society of Saskatchewan is set forth in the document entitled "Current Complaints and Complaints History".

4. At all times material, Mr. Nolin was married to C.Z. At the time of the transactions in question, he and his wife were separated. He and his wife maintained a joint bank account in both their names however this was in name only and Mr. Nolin had sole control over this account and received the benefit of all deposits and deposits and withdrawals from same. Mr. Nolin had the only debit card for it. C.Z. never used this account nor did she have any knowledge of the transactions in question when they occurred. Mr. Nolin used this account to pay his monthly household expenses.

5. E.B. was a client of Mr. Nolin and had retained him to represent him in a criminal matter. D.W. was a client of Mr. Nolin's, who had retained him to act on his behalf in a real estate transaction. Similarly, C.E. was a client of Mr. Nolin's who had retained him to act in another real estate transaction.

6. During the month of September 2007, certain monies were deposited to the firm's trust account by way of retainer in relation to Mr. Nolin's defence of E.B. On or about the 23rd of October, Mr. Nolin caused a trust cheque to be drawn on the trust account payable to C.Z. in the amount of $1000.00 for "agency fees". These funds were later deposited by Mr. Nolin to the joint account maintained by Mr. Nolin and C.Z., details of this transaction are set out in the exhibit book filed herewith.

7. Mr. Nolin acted on behalf of D.W. in purchasing a private residence in Saskatoon. During the month of August 2007, certain sums were received from various sources to make good the purchase price of this dwelling. These sums were deposited to the firm's trust account, certain sums were disbursed from this trust account in the ordinary course as part of the transaction. In addition to this, on or about the 19th day of October, 2007, Mr. Nolin caused a cheque to be drawn on the trust account payable to C.Z. in the amount of $800.00 by way of "commission". These funds were later deposited by Mr. Nolin to the joint account maintained by Mr. Nolin and C.Z.

8. C.E. retained Mr. Nolin to act on his behalf in the purchase of a residential property in Saskatoon. During the months of August and September, certain sums were received by Mr. Nolin and placed in the firm's trust account to make good the purchase price of the property. Certain amounts were disbursed from the trust account in the ordinary course to complete the transaction. In addition to this, Mr. Nolin did on or about the 21st of September 2007, cause a trust cheque in the sum of $1,000.00 to be drawn on this account payable to C.Z. by way of "commission". This sum was later deposited by Mr. Nolin to the joint account maintained by Mr. Nolin and C.Z.

9. C.Z. is not and has never been a real estate agent or had a similar occupation. She had no involvement in, nor knowledge of, the transactions in question or facts surrounding same until one evening in November of 2007 when Mr. Nolin disclosed to her his inappropriate activities concerning the trust funds. In each case, the above-noted sums payable by way of cheque to C.Z. were misappropriated by Mr. Nolin from trust for fictitious transactions.

10. In each case, the funds were deposited to the joint account maintained by Mr. Nolin and his wife. In each case, C.Z. received no benefit from any of these transactions, Mr. Nolin received all monies that were misappropriated.

11. In each case, the fictitious transaction was supported by false entries in the firm's accounts and records, including accounting records, cheques and trust statements. In each case, the cheque payable to C.Z. was signed by Mr. Nolin. Particulars of these transactions and the false documents ~~supporting~~ supporting same are set out in the exhibit book filed herewith. In each case after the improper conduct was discovered, Mr. Nolin made restitution of the funds improperly received by him.

12. In some cases, the client was sent a fictitious account and in all cases, the firm forwarded a proper accounting of trust funds handled in the end result.

13. The above-noted trust irregularities were discovered by members of the firm. When the firm became aware of these issues Mr. Nolin was questioned by one of the firm's partners. He initially denied anything improper but later admitted he had drawn the three cheques payable to C.Z.. Mr. Nolin returned the misappropriated funds to the firm's trust account on or about the 19th of November 2007.

14. Mr. Nolin further reported these irregularities to the Law Society on or about the 20th of November 2007 by way of correspondence to Ms. Donna Sigmeth, a copy of which is set out in the exhibit book filed herewith.

15. Mr. Nolin's income was determined by a certain percentage of the amount collected on fees attributable to files handled by him. Disbursements made and recovered would not form part of this calculation. Mr. Nolin was intending to reduce the amount of fees payable by the client to the firm by the amount of the fictitious disbursements from trust. The client would not pay any more by way of combined fees and disbursements than if the billing was done in an appropriate fashion. Mr. Nolin however, would receive one hundred (100%) percent of the amounts improperly described as agent's fees or commissions rather than the percentage of fees he was normally entitled to, thereby depriving the firm of monies properly payable to it. In the end result, none of the three clients involved suffered any financial loss.

The above facts are hereby admitted to by the member, Michael D. Nolin, by his counsel, Morris P. Bodnar, Q.C. this 7th day of August, 2008, at Saskatoon, Saskatchewan.

Morris P. Bodnar, Q.C.