



**The Law Society of Saskatchewan
Discipline Decision #06-06
regarding E.F. Anthony Merchant, Q.C. of Regina, Saskatchewan**

DECIDED: June 23rd, 2006

Background

The Law Society of Saskatchewan was established in 1907, and governs the legal profession in the Province of Saskatchewan under *The Legal Profession Act, 1990*. Its Board of Directors, called Benchers, consists of 17 persons elected from various constituencies in the Province, 4 non-lawyer members of the public appointed by the Lieutenant-Governor in Council and the Dean of the College of Law.

The disciplinary process is usually undertaken on the basis of complaints received from clients, members of the public or other lawyers, however, the Law Society does initiate its own investigations where information comes to its attention which indicates inappropriate or unprofessional behaviour.

Conduct unbecoming is defined as: “*any act or conduct, whether or not disgraceful or dishonourable, that (1) is inimical to the best interests of the public or the members; or (2) tends to harm the standing of the legal profession generally*”.

The penalty options available to the Benchers in sentencing a member who has been found guilty of conduct unbecoming range from a reprimand, fine and/or the imposition of practice conditions to disbarment and resignation in the face of discipline. The Law Society does not have the jurisdiction to award damages against a member, however, may require the member to pay the costs of the discipline hearing.

Charges

1728.13

1. Is guilty of conduct unbecoming a lawyer in that he did withdraw or authorize the withdrawal of trust funds belonging to B.P. contrary to Court Order and without the consent of B.P.

(Reference: Code of Professional Conduct, Chapter IX, Chapter XIII and Chapter XIX)

1728.14

1. Is guilty of conduct unbecoming a lawyer in that he did correspond to various residents of Estevan, Saskatchewan, by letter dated August 10, 2004, with attached Retainer Agreement, which letter and Retainer Agreement, were reasonably capable of misleading the intended recipients.

(Reference: Chapter XIV of The Law Society of Saskatchewan Code of Professional Conduct, Rule 1601(2)(c) of the *Rules* of The Law Society of Saskatchewan)

*Facts***Re: Law Society File 1728.13**

1. Mr. Merchant represented a party, D.P., in a matrimonial matter. The family home had been sold and the net sale proceeds of the home were being held in trust by Merchant Law Group. Following a trial, Justice Koch ordered that a portion of the sum being held in trust by Merchant Law Group was to be paid to the husband, B.P., upon the expiry of the appeal period.
2. Despite repeated requests by B.P. following the expiry of the appeal period, Mr. Merchant refused to pay the trust funds to B.P. As justification for this refusal, Mr. Merchant asserted a claim to the trust funds on behalf of his client, D.P., relating to costs assessed in D.P.'s favour against B.P. In due course, Mr. Merchant arrange for transfer of a portion of the trust funds to the Merchant Law Group general account in payment of fees owing by D.P. to Merchant Law Group. Mr. Merchant alleged that he was entitled to do this by reason of the equitable right of set-off. The argument was that if B.P. owed money to D.P., and Merchant Law Group owed money to B.P., and D.P. owed money to Merchant Law Group, then Merchant Law Group can set off.
3. The Hearing Committee found that the court had ordered that the funds be held in trust for B.P., and that the doctrine of equitable set-off had no application. The Hearing Committee concluded that the money should not have been removed from the trust account without either court direction or the consent of B.P., neither of which had been provided. The Hearing Committee pointed out that the Rules respecting trust accounts require that lawyers hold trust funds for the protection of the individual for whom the money is being held, and not for the benefit of the lawyer unless so ordered or agreed. Mr. Merchant was found guilty of conduct unbecoming.

Re: Law Society File 1728.14

4. On or about August 12, 2004, Mr. Merchant sent unsolicited correspondence to approximately 150 to 200 residents and businesses in Estevan that were evacuated as a result of a train derailment. The correspondence was accompanied by a retainer agreement. The correspondence indicated that if Merchant Law Group recovered nothing for the potential party, then the party would pay nothing. However, the enclosed retainer agreement was inconsistent with this in that it indicated that the party would be responsible for certain expenses if Merchant Law Group decided that the action would not be pursued or if the party unilaterally decided not to pursue the case.
5. Mr. Merchant testified that he had relied on his assistants, and that the sending of the particular retainer agreement was in error. However, he provided no evidence as to the procedures implemented so as to ensure that errors were discovered and corrected.
6. The Hearing Committee found that the inconsistencies between the correspondence and the retainer agreement were reasonably capable of misleading the intended recipients, and that Mr. Merchant was responsible for sending them out. The Hearing Committee held that the onus is on the lawyer to take adequate measures to prevent this kind of mistake from occurring, and found Mr. Merchant guilty of conduct unbecoming.
7. The Hearing Committee noted that the inconsistencies between the correspondence and the retainer agreement were almost identical to those contained in material that had been sent out by Mr. Merchant on an earlier occasion, for which he had been disciplined.

*Penalty***The B.P. Matter – File No. 1728.13**

The Sentencing Committee disapproves of the Member's highly inappropriate action in dealing with trust funds – funds that belonged to B.P. The Sentencing Committee acknowledges that the Member notified counsel for B.P. of the transfer of these trust funds; however, he effected this transfer in direct contravention of a court order. Accordingly the Sentencing Committee imposes the following penalty:

1. The Member is suspended for a period of two (2) weeks commencing on August 1, 2006; and
2. Costs in the amount of \$36,205.96 plus costs incurred for this Sentencing Hearing with respect to this citation. Such costs are payable to the Law Society of Saskatchewan within twelve (12) months of this date. In the

event the Member requires further time to pay, he may make application to the Chair of the Discipline Committee for an extension of time.

In the course of this Sentencing Hearing, reference was made to the operation of the National Mobility Agreement, and its application to the Member. The Sentencing Committee declines to take into account this Agreement or its application to the Member.

The Estevan Matter – File No. 1728.14

The factual circumstances surrounding this citation are reminiscent of an earlier citation for which Mr. Merchant was sentenced on December 18, 2000. This conviction and sentence ultimately were sustained by the Saskatchewan Court of Appeal, see: *Merchant v. Law Society of Saskatchewan* (2002), 23 Sask. R. 1. The Sentencing Committee notes that there is an important feature which distinguishes this matter from the earlier one, namely that the incident giving rise to this citation involved negligent, rather than deliberate, conduct by the Member.

Accordingly, the Sentencing Committee imposes the following penalty:

1. The Member is formally reprimanded;
2. A fine in the amount of \$2,500 payable to the Law Society of Saskatchewan within three (3) months of this date, failing which this matter will be referred to the Chair of the Discipline Committee; and
3. Costs in the amount of \$21,663.18 plus costs incurred for this Sentencing Hearing with respect to this citation. Such costs are payable to the Law Society of Saskatchewan within twelve (12) months of this date. In the event the Member requires further time to pay, he may make application to the Chair of the Discipline Committee for an extension of time.