DISCIPLINE CASE *DIGEST*

Case 14-09 (AMENDED)

Member:	**Lawrence Bremner Cherrett**
Jurisdiction:	Winnipeg, Manitoba
Called to the Bar:	June 28, 1979
Particulars of Charges:	Professional Misconduct (2 Counts): ▪ Breach of Rule 2.1-1 of the *Code of Professional Conduct* [Integrity] [x2]
Dates of Hearing:	January 21 & 22, 2015 and July 21, 2015
Panel:	▪ Jacob P. Janzen (Chair) ▪ David N. Gray ▪ Marston Grindey (Public Representative)
Counsel:	▪ Darcia A.C. Senft for The Law Society of Manitoba ▪ Member Self Represented at Conduct Hearing ▪ Gavin Wood for the member at Sentencing Hearing
Date of Decision(s)	Reasons for Decision: February 26, 2015 Sentencing Decision: October 6, 2015 Court of Appeal Decision: December 8, 2016
Disposition:	▪ Disbarment ▪ Costs of $16,000.00
Appeal:	Appeal to the Manitoba Court of Appeal dismissed with costs on December 8, 2016.

Integrity and Misappropriation

Facts

In 2004, Mr. Cherrett was retained by a client in connection with the administration of the estates of the client's parents. Administration of both estates was substantially complete by the summer of 2007. There remained only the need for Clearance Certificates from Revenue Canada, a reconciliation of taxes paid for the estate by the client personally, payment of the accountant's fees and the discharge of an administrative bond. The two beneficiaries were paid their respective shares and Mr. Cherrett retained the sum of $20,000.00 in his trust account. Those holdback funds remained in the trust account until April 17, 2009.

By April 2009, Mr. Cherrett's practice was in difficulty. Charges of professional misconduct had been authorized against him and his conduct in other matters was under investigation. On April 22, 2009, Mr. Cherrett undertook to withdraw from the practice of law effective June 20, 2009 for

a minimum period of one calendar year and undertook to cooperate with the custodian of his practice relating to the orderly transfer of open files to new counsel. In exchange, the Society agreed to suspend prosecution of the outstanding charges and the investigations underway at that point. There was a further undertaking given dated July 2, 2009 which was similar to the first undertaking. It included a statement that Mr. Cherrett's doctor had determined that he was disabled due to illness and had recommended that he take time away from practice for treatment. The withdrawal from practice deadline was unchanged. Mr. Cherrett had never advised his doctor that at the material times he was prohibited from practising law by reason of the undertakings given to the Society.

On April 11, 2009, Mr. Cherrett wrote a trust cheque in the amount of $20,000.00 drawn from estate trust funds. The trust cheque was made payable to the Bank of Nova Scotia. The funds were withdrawn from the trust account and deposited personally by Mr. Cherrett to an account at Scotiabank. The account at Scotiabank was in the name of a numbered company of which Mr. Cherrett was the sole director. He also had sole signing authority on the corporate account.

On the same date, Mr. Cherrett obtained a Scotiabank bank draft from the corporate account in the amount of $10,000.00 made payable to the Royal Bank of Canada. On April 20, 2009, Mr. Cherrett attended at a Royal Bank branch and deposited the $10,000.00 bank draft to the credit of a personal account in the name of himself and his spouse.

On June 20, 2009, Mr. Cherrett obtained another Scotiabank bank draft in the amount of $10,000.00 paid out of the same Scotiabank corporate account. This further draft was also made payable to the Royal Bank. Mr. Cherrett attended at the same Royal Bank branch (to which he had deposited the first bank draft) and deposited the draft to the credit of the same personal bank account he shared with his spouse.

The corporate account at Scotiabank was closed on November 18, 2009. Apart from service fees, the only activity in the corporate account from March 2009 to the date of closing was the $20,000.00 deposit made on April 11, 2009 and the two $10,000.00 withdrawals.

In August of 2009, Mr. Cherrett provided a lengthy hand-written summary of the status of 25 files to the custodian of his law practice but did not mention the estates in question. The transfer of funds from trust to the Scotiabank corporate account and the transfers from the corporate account to Mr. Cherrett's personal account at the Royal Bank took place without any communication to the client and without the client's knowledge, consent, or authorization.

A Clearance Certificate in respect of one estate issued in March 2010 and in October 2010 for the remaining estate. After receiving the certificates and believing that Mr. Cherrett was still practicing law, the client contacted him about finalizing the estate matters. By early 2012, the other beneficiary was expressing impatience about the delay and contacted the Society only to learn that Mr. Cherrett was not practising. The client then contacted Mr. Cherrett who confirmed that he did not have a licence to practice; however, he advised that he anticipated getting his licence back soon and said he would then be able to access the $20,000.00. Subsequently, the client met with Mr. Cherrett and advised of a desire to pay out the other beneficiary and not wait for all matters to be finalized. The client wrote to the other beneficiary in May 2012, providing a final accounting and a bank draft representing the beneficiary's entitlement. The client believed the holdback funds were in a trust account. In May 2013, the client contacted the Society about Mr. Cherrett's return to practice and the Society conducted an investigation. The Society obtained information from the financial institutions regarding the nature of the activity in the Scotiabank corporate account and the identity of the holders of the account at the Royal Bank. The Society also found a copy of a letter on the file addressed to the client dated April 11, 2009 from Mr. Cherrett wherein he advised that he was enclosing his trust cheque in the sum of $20,000.00. The letter was never sent to the client. At the time of the discipline hearing, the client still had not received the $20,000.00 from Mr. Cherrett in whole or in part.

Plea

Mr. Cherrett entered a plea of not guilty to the charges.

Decision and Comments

With respect to the misappropriation charge, the panel was satisfied that Mr. Cherrett misappropriated the $20,000.00 and that he did so purposefully. The hypothesis that Mr. Cherrett at all material times was in a "cognitive fog" so as to relieve him of responsibility was inconsistent with the evidence. Any evidence of mental lapses given fell far short of explaining the kind of systematic conduct which constituted the misappropriation. Any health issues described did not amount to an explanation for the conduct. As well, there was convincing evidence that Mr. Cherrett during the material time was capable of sustained cognitive effort. Further, the panel found that the manner in which the funds were transferred from Mr. Cherrett's trust account into his personal account was a model of "deliberate and considered conduct." The method was complex and Mr. Cherrett took a number of steps which appeared designed to obscure the ultimate destination of the funds. Finally, the panel found that Mr. Cherrett's responses to the Society were inconsistent with those of a person who had a genuine interest in finding out what had become of the estate funds. Rather, his responses were more consistent with those of a person who would rather that no one discover what had occurred.

With respect to the charge that after his withdrawal, Mr. Cherrett represented to the client that he was holding $20,000.00 on behalf of the estates in trust and that he was in a position to issue a trust cheque when he returned to practice, the panel determined that once he expressly represented to the beneficiaries that the holdback funds were in trust, he was under a strict obligation to expressly advise the client in the event of the funds being paid out of trust. Mr. Cherrett could and should have advised the client that he was no longer practicing law and that he no longer had the funds in trust. Further, Mr. Cherrett actively participated in giving effect to the idea that the funds were in trust. He made representations to the client that were a sham.

The panel accepted as its guiding legal principle that absent exceptional circumstances, in cases of misappropriation the appropriate sanction is disbarment. The panel noted Mr. Cherrett's prior discipline history which might be construed as an aggravating factor. Also, the panel determined it was a seriously aggravating factor that Mr. Cherrett had personal use of the monies for several years and did nothing to remedy that wrong. It was argued that Mr. Cherrett had some health issues, but there was no medical evidence as to what role, if any, those issues had upon the conduct at issue. With respect to the argument that he had diminished capacity, the panel found that the constellation of psychological and emotional factors was inconsistent with Mr. Cherrett's actions. Finally, the panel noted that the misconduct coincided with efforts by the Society to resolve matters in a remedial and reconciliatory way. The timing of the misconduct showed a particularly culpable disregard to the Society. The panel did not find any exceptional circumstances on the facts of the case.

Penalty

The Panel order that Mr. Cherrett be disbarred and his name struck from the rolls of the Society. As well, the panel ordered that Mr. Cherrett be required to pay costs to the Society in the amount of $16,000.00.

Appeal

The member appealed the conviction and sentence to the Manitoba Court of Appeal. The appeal was dismissed with costs pursuant to a decision rendered on December 8, 2016.