



# DISCIPLINE CASE *DIGEST*

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Case 11-05

<b>Member:</b>	Brian Rickey Kress
<b>Jurisdiction:</b>	Winnipeg, Manitoba
<b>Called to the Bar:</b>	June 26, 1973
<b>Particulars of Charges:</b>	Professional Misconduct (3 Counts): <ul style="list-style-type: none"><li>▪ Breach of Chapter 5 of the <i>Code of Professional Conduct</i> [acting when there was or was likely to be a conflict; failing to withdraw as counsel and failing to refer clients to new counsel; preferring the interests of one client over the other] [x2]</li><li>▪ Breach of Chapter 12 of the <i>Code of Professional Conduct</i> [failing to facilitate the orderly transfer of one client's file to new counsel and improperly exercising a solicitor's lien over the file]</li></ul>
<b>Plea:</b>	Guilty
<b>Date of Hearing:</b>	October 27, 2011
<b>Panel:</b>	<ul style="list-style-type: none"><li>▪ Vivian Rachlis (Chair)</li><li>▪ Mark Toews</li><li>▪ Marla Garinger Niekamp (Public Representative)</li></ul>
<b>Counsel:</b>	<ul style="list-style-type: none"><li>▪ Rocky Kravetsky for The Law Society of Manitoba</li><li>▪ Douglas Ward, Q.C. for the Member</li></ul>
<b>Disposition:</b>	<ul style="list-style-type: none"><li>▪ Fine of \$1,500.00</li><li>▪ Costs of \$2,500.00</li></ul>

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## Conflicting Interests

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### Facts

In January 2007 Mr. Kress was retained by a woman to effect a transfer to her of her 87 year old mother's residence. The house had a \$50,000.00 mortgage registered in favour of a Credit Union, which was security for a line of credit previously given to the daughter. Mr. Kress met with both the mother and daughter in January 2007 in connection with the property transfer. The mother advised that she wished to transfer the property to her daughter who was experiencing financial problems. The daughter was to pay the fees and land transfer tax. Mr. Kress did not inquire into the nature or the extent of the daughter's financial problems, nor did he have a discussion with either the mother or the daughter about any existing or potential conflicts of interest, or the need to obtain independent legal advice. He made inquiries as to the mother's

physical and mental health, and concluded that she understood the nature and effect of the transaction. Mr. Kress accepted the instructions from the mother and daughter and the property was transferred subject to the existing mortgage. There was no arrangement to release the mother from her covenant on the mortgage, or any discussion about the mother's future living arrangements. At the time of the transfer of land, three judgements in favour of the Canada Revenue Agency (CRA) were registered against the daughter's other properties. The daughter was in default under a mortgage of her own home and business property, and had another debt owing to a secured creditor. The purpose of the transfer of the mother's house was to meet the requirements of a lender with whom the daughter was negotiating an increase in her borrowings so as to restructure her debts.

In May 2007 the mother contacted Mr. Kress and advised that the transfer had created family problems, and requested that he contact the daughter. The daughter confirmed this advice and asked Mr. Kress to transfer the property back to the mother. She was, however, unable to pay the land transfer tax required for the transfer of title. Mr. Kress suggested that a caveat be filed stating that the mother had an interest in the home. He prepared and registered a caveat in the Winnipeg Land Titles Office, which was stated to be pursuant to an agreement dated May 4, 2007. Mr. Kress later filed a letter stating that the interest was that of an unpaid vendor, and that he was the solicitor for all parties involved. In fact there was no agreement, and the transaction in January had been an outright gift of the property. Mr. Kress did not discuss with either the mother or daughter whether one or both of them should consult with other counsel.

Mr. Kress billed the daughter for the fees, disbursements and land transfer tax in connection with the initial transfer, and for the preparation and registration of the caveat. No report or account was ever sent to the mother. A cheque tendered by the daughter was dishonoured. Mr. Kress sued her and obtained Judgment, however, he was unsuccessful in obtaining execution on the Judgment.

With the assistance of her son, the mother retained a new lawyer who arranged to have the property transferred back to the mother. CRA took the position that the transfer was a non-arms length transfer from a tax debtor for no consideration, and that the mother was now liable for the daughter's outstanding debts to CRA. The mother's new lawyer sought information from Mr. Kress including access to his file in order to challenge the decision. Mr. Kress did not turn over the file and would not provide any information until his account was paid. In April 2008 the mother's son paid to Mr. Kress the outstanding amount and then received the information and documents required by the new lawyer. The new lawyer's efforts to have the CRA assessment set aside were unsuccessful, and the mother was forced to sell the home and pay CRA the sum of \$115,000.00 to satisfy its assessment.

### **Plea**

Mr. Kress entered a plea of guilty to three counts of professional misconduct which included acting in a matter when there was, or was likely to be a conflict without adequate disclosure to, and consent of the clients, failing to withdraw as counsel, failing to refer the clients to new counsel, preferring the interests of the daughter over the mother, and failing to facilitate the orderly transfer of the mother's file to new counsel.

### **Decision and Comments**

The panel accepted Mr. Kress' admission to all three counts and found him guilty of professional misconduct.

### **Penalty**

The panel accepted the joint recommendation made by counsel for the Law Society and for Mr. Kress, and ordered Mr. Kress to pay a fine in the amount of \$1,500.00 and costs to the Society in the amount of \$2,500.00 towards the investigation and prosecution of the matter.