



Decision No. 20150625

THE LAW SOCIETY OF MANITOBA
ADMISSIONS AND EDUCATION

IN THE MATTER OF: Student A,

Appellant,

AND IN THE MATTER OF: A Decision of the Director of Education,

Dated: April 27, 2015

DECISION OF THE APPEAL SUB-COMMITTEE

FACTS:

1. Student A (hereinafter the appellant) is a student in the CPLED program of the Law Society of Manitoba for the year 2014-15.
2. Within that program students are required to write a series of competency examinations. One of those sections is "Legal Research and Writing" which the appellant re-wrote on March 31, 2015.
3. That examination was marked originally by Lisa Labossiere and re-read by Kathy Bueti, both well known, competent criminal defence attorneys. The marks the appellant received were 51.17 and 52.67, respectively. A passing grade is 60.0.
4. The appellant was advised of the decision by the Director of Education by letter dated April 27, 2015. It is from that decision the appellant filed an appeal dated May 1, 2015.

The appellant did not request an oral hearing, nor was one directed by the Chair of Admissions and Education. In the result, the appeal is based entirely upon the written materials.

5. The panel received the materials in advance and met on June 25, 2015 to determine the appeal. In making its decision the panel received and reviewed the following materials:
 - a. Guidelines for the Appeal;
 - b. The Notice of Appeal dated May 1, 2015;
 - c. The assignment and criteria provided to the student;
 - d. The assignment submitted by the appellant;
 - e. The annotated assessment criteria used by the markers;
 - f. The mark sheet of both the original marker and the re-read marker; and
 - g. The letter of the Director dated April 27, 2015.

STANDARD AND BASIS OF REVIEW

6. The sub-committee is entitled to allow the appeal (with or without conditions), make any decision that could have been made by the CEO, or dismiss the appeal. The sub-committee standard for this review therefore is correctness in that it is required to determine any basis for allowing the appeal and is entitled to review additional materials and to substitute its opinion for that of the Society and its markers and CEO (or designate).
7. The appeal is based upon a review of the materials and is not limited to determination of the matter strictly as a pure determination of whether there was an error made by the markers, or either of them, in the determination of a grade. Nor is the appeal limited to those matters strictly raised by the Notice of Appeal. The appeal subcommittee has, in addition to the materials viewed by the markers, the benefit of additional materials and explanations, which are to form part of the basis for its decision. In this case limited additional materials were provided.
8. It is not, however, the role of the committee to necessarily perform yet another complete re-read of the assignment in detail with reasons. Rather, the appeal is determined on an assessment of whether or not the assignment justifies an overall passing mark.

ANALYSIS

9. While it is not strictly bound by the Notice of Appeal, that document provides a useful starting point especially for the subject matter of this particular competency. The appellant writes, "Appeal is based upon marks given. Specially (sic) marks given on analysis section."
10. There are two initial comments available about that appeal. Firstly, for the committee to be convinced that a higher grade was justified to a pass, based upon the ground set out in the appeal it would have to raise the scores on that section to 82.64 on the re-read and 75.32 on the original assessment. These variations are based upon the balance of the scoring for the assignment provided by the appellant. Such scores would require the assignment to demonstrate an intermediate level of the knowledge, skill or ability being assessed. Secondly, because this is an assignment about legal research and writing, the creation of grammatical errors in the very appeal of a legal writing assessment is particularly worthy of comment.
11. The committee also reviewed the grounds of appeal. It contained, essentially, four points. These are:
 - a. That case law was provided for each of the issues identified;
 - b. That it was not necessary to go "deep into the issues" in analysis because the target audience was a lawyer;
 - c. That the word count limited the ability to provide a complete analysis; and
 - d. That the marker unfairly characterized a phrase ('room to fabricate and collude') as having no meaning.

It may be that the appellant intended additional arguments, certainly there was a short summary that suggested additional arguments that ought to have been found in the original assignment, but both because of the grammar and structure of the materials provided were not capable of determining exactly what that was. This failure to analyze the requirements of the appeal was noted given the nature of the assignment

12. We started by considering each of the points raised by the appellant. The determination regarding the provision of case law was that, while a number of cases were mentioned and cited, there appeared little analysis of the significance of either the case or the meaning of the quotes provided. In legal writing a quote is, or should be, intended to provide illustration of an argument or support for it. It is not intended as the substance of the argument without specific connection to the facts of the case. We found little merit in that argument from the appellant.

13. The second ground is perhaps the most troubling. The assignment specifically required the student to provide, "your opinion as to the admissibility of this evidence". It later goes on to instruct the writer to, "Be focused — don't go off on tangents" and later, "you should consider how likely it would be for a judge to admit the evidence in this situation", Moreover the appellant was provided with the assessment criteria, which show that analysis (emphasis added) is 25% of the mark. Those criteria repeatedly set out the need for an opinion and the connection of any law to the facts for the formation of that opinion. In conjunction with the prior ground, we find that the appellant either misunderstood, or at minimum misapplied, the criteria in providing his materials. The very exercise calls for a deep analysis, but the appellant provided, instead, a superficial one, and primarily focused the analysis on irrelevant facts.
14. We find the third ground entirely without merit. All of the students were given the same word count. The criteria specifically cautioned to be focused. In this instance we found that the appellant wasted words on unnecessary recitation of facts which he later did not use or used only peripherally. Moreover, he quoted long sections of cases as if that would substitute for analysis, which then formed an opinion, The foundation of the work being paid for, if this were a client, is the determination of an opinion. To minimize the conclusion because of word count seriously misapprehends the very role of the lawyer and the competency, which was being evaluated in this assessment. Within the word count permitted, focus should have been on relevant facts, relevant case law, and analysis, which ties the two together.
15. It seemed that the work was produced by rote recantation of various quotes, important though those principles may be, they could not be a substitute for analysis. It was as though the research was the analysis. Nothing could be more incorrect. While accurate and thoughtful research is necessary for correct analysis (and from that analysis an opinion/strategy, which addressed as far as practicable the concerns of the client); it is not a substitute for same. In an assignment which has as its largest element analysis (25%) and another section on conclusion (10%) it seems odd that little word count would be set aside for those purposes.
16. Lastly, the marker rightly pointed out that the phrase used, which the appellant attempted to explain in his appeal materials, did not have any basis in law for its inclusion. The factual situation was that a police officer received telephone calls on a phone, which was presumed to be in the possession of the client (although the issue of possession seems not to have been considered by the appellant). The telephone is available. The calls presumably were able to be demonstrated as being received. While the SCC and other authorities have suggested caution in these cases because one cannot know the intention or character of the caller or if an error of some sort was

made; there is no suggestion here that there was collusion between the caller and the police officer. Indeed how would one even create a scenario in which a police officer at a scene colluded with an unknown caller? Nor is there an iota of credible evidence that the officer fabricated the existence or nature of the call. While it is certainly a viable line of attack that the officer was incomplete or mistaken in the specific words used, such a point is founded neither in collusion nor fabrication and certainly was neither an appropriate line of thinking or analysis on the facts presented in the assignment.

17. Despite a finding that none of the specific arguments raised by the appellant is with merit that does not end the matter. The appellant is entitled to have the committee review the assignment to determine if, on its assessment, there is a basis to issue a passing grade or provide some other remedy. In doing so we read the assignment individually and then considered each of the criteria individually to determine if a passing grade was reasonable.

18. In considering the assignment we were struck by the number and extent of grammatical and spelling errors contained within the assignment. There were multiple errors, which ranged from things as simple as the spelling of the word "Conclusion", to the use of a list without connection to a sentence, to the misuse of punctuation (e.g, commas set out for no apparent purpose), and to the failure to use articles with phrases. While the markers dealt with this it was our opinion that the writing was less than satisfactory. This is a problem that creates a further problem. Markers are expected to not deduct additional points for these errors. But the problem with such errors is that it creates a problem in identifying the underlying thinking or analysis of the problem. While we attempted to resolve any such error in favour of the appellant this was not always possible.

19. Moreover the structure of the assignment seemed strange to us, given the very clear parameters set out in the assignment and the criteria provided to him, In particular the appellant seems to have never fully identified the specific needs of the client and the perspective that need should create. The format was a rambling recitation of case law and texts without structure that would assist in determining either the likely strategy of the Crown for admission or appropriate responses that would be available for the client (or as important the likelihood of success and risks associated with each strategy).

20. In reviewing the sections we determined what marks we thought appropriate. In large measure we were unanimous on the marks we would have given, and in any cases in which there was disagreement we were very close (the next highest or lowest number in assessment). In our collective assessment the marks provided by the markers were

generous. In all but one or two sections our marks would have been either the lower of the scores provided by the markers or slightly lower. In those other cases our assessment would have been no higher than the higher of the markers scores.

21. In order for the appellant to be successful on the appeal as set out in his grounds, as noted at the outset of these reasons, there would need to be a significant increase in the scores for analysis. In fact, this was one area in which we were agreed that the lower of the scores was correct or high. In order to be successful, the appellant would have had to have shown, according to the assessment criteria, "intermediate level demonstration of the knowledge, skill, or ability". Instead we were left with an assignment that showed a "partial, but insufficient, demonstration..."³¹ at the most generous assessment. In some cases a more accurate assessment was a, "minimal demonstration of the knowledge, skill, or ability". Such assessments would have been below the AO cumulative score and certainly would never have risen to the level necessary to create a passing grade.
22. Still, we recognize that there are differing views on an assignment. As a final check, given that there were no instances in which we would have increased the score higher than the higher of the two assessments, we took the higher score of each assessment and determined if that would create a passing grade. This process is fraught with difficulty and can only be used to see if a more significant re-assessment would be warranted. Because markers are specifically instructed not to duplicate the penalty for errors (for instance if an issue is missed the lack of analysis of that issue is not to be considered) such a process would have the effect of increasing any score past any reasonably likely actual score. In this case, even if the best score provided by either marker, or the sub-committee, were used the score would still be under that necessary for a passing grade.
23. As we noted above, there are problems with the appeal documents that mirror the problems reflected in the assignment. These issues were not determinative of the appeal, although they did assist in assessing the materials. Rather the appeal was determined on the basis of the assignment, criteria, and marking provided as material. That issue did help us formulate an opinion as to a possible cause which ought to be addressed.
24. Good writing comes not only from the actual knowledge of the rules of grammar and spelling of words; but from clear thinking and a focused purpose. Bad writing, which was displayed throughout the assignment, often comes from the opposite; unclear thinking and an undefined purpose. The competency being assessed in this part is fundamental to the practice of law. We are concerned that the appellant appeared not to fully understand the criteria upon which he was being assessed and the problem posed in the assignment. Without that understanding the ability to produce satisfactory work will be greatly impaired. Moreover, even if a lawyer understands the issue and the

necessary response to same; the ability to communicate that understanding is fundamental to the practice. The communication here, and the analysis underlying that communication, is well below the minimum standard required by the Society. While not within our power to direct, we believe those issues of communication ought to be the subject of work by the appellant.

CONCLUSION AND DETERMINATION OF THE APPEAL

25. In conclusion, the grounds set out by the appellant are without merit. The independent review of the sub-committee would not have resulted in a passing grade. Finally, even the highest assessment provided by each of three processes would not have resulted in a passing grade. We cannot find any basis to grant the appeal.

26. The appeal of the appellant is dismissed and the decision of the Director of Education is confirmed.

Dated at the City of Winnipeg this day of August, 2015.



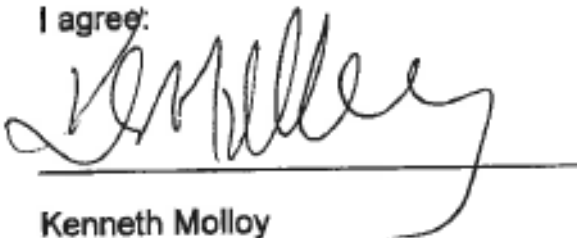
David Gray, Chair

I agree:



Kim Antonio

I agree:



Kenneth Molloy