



DISCIPLINE CASE *DIGEST*

Case 10-02

Member:	Michael Daniel Kohaykewych
Jurisdiction:	Selkirk, Manitoba
Called to the Bar:	June 24, 1975
Particulars of Charges:	Professional Misconduct (11 counts) <ul style="list-style-type: none">▪ Breach of Chapter 1 of the <i>Code of Professional Conduct</i> (hereinafter referred to as “the Code”) [integrity] – x3▪ Breach of Chapters 1 and 6 of the Code [integrity and conflict of interest] – x5▪ Breach of Chapter 6 of the Code [conflict of interest] – x1▪ Breach of Chapter 2 of the Code [quality of service] – x1▪ Breach of Chapter 11 of the Code [excessive fees] – x1
Plea:	Guilty
Date of Hearing:	January 25 and 28, 2010, February 24, 2010 and March 3 and 5, 2010
Panel:	<ul style="list-style-type: none">▪ Heather S. Leonoff, Q.C. (Chair)▪ James W. Hedley▪ Karen L. Clearwater
Counsel:	<ul style="list-style-type: none">▪ Stephen F. Vincent for The Law Society of Manitoba▪ Gavin M. Wood for the Member
Disposition:	<ul style="list-style-type: none">▪ Suspension for a period of 1 year commencing June 1, 2010▪ Upon reinstatement the member will practise for 2 years under supervision▪ Costs of \$55,000.00 of which \$10,000.00 must be paid prior to making application for a practising certificate

Breach of Integrity and Conflict of Interest

Facts

In October 1989, Mr. Kohaykewych obtained a Power of Attorney from his client who was then 86 years of age. He used the Power of Attorney on July 6, 1990 to write a cheque for \$25,000.00 from the client to an entity known as Court Enterprises. Mr. Kohaykewych was an officer, director and shareholder of this company. Court Enterprises then transferred the money to his law firm. Similar payments were made on September 27, 1990 and December 28, 1990 in the amounts of \$5,000.00 and \$22,000.00 respectively. In total, Mr. Kohaykewych received \$52,000.00 from his client through Court Enterprises.

Mr. Kohaykewych did not prepare documentation to substantiate the debt owing to his client. The \$52,000.00 was recorded on the financial statements of Court Enterprises as a loan. The client signed a Direction dated September 21, 1990 authorizing Mr. Kohaykewych "to make a mortgage investment on my behalf in favour of Court Enterprises." The Direction included an acknowledgement by the client that she was aware that Mr. Kohaykewych was an officer of the corporation and thereby had an interest in the transaction. The client was not sent for independent legal advice before executing this Direction.

A form of mortgage referencing a loan of \$30,000.00 bearing an interest rate of 13.5% per annum with payments of \$345.00 per month was prepared in September 1990. It was never executed and filed in the Land Titles Office and there was nothing to document the terms of the other \$22,000.00 loan.

Mr. Kohaykewych made payments on the \$30,000.00 loan as stipulated in the unsigned mortgage from October 1990 until April 1993. Thereafter, payments were sporadic and ceased in October 1994. Between 1998 and 2005 Mr. Kohaykewych made lump sum payments on four occasions totalling \$87,361.00 on his outstanding indebtedness. An expert witness retained by the Law Society concluded that if reasonable interest rates for the time periods in question were applied and full payment made after fifteen years, there was still in excess of \$78,000.00 owing to the estate for the loans as of mid April, 2005.

In Form Ds filed by Mr. Kohaykewych for the years January 1996 to December 1999, he reported that he had not borrowed any money from a client. His subsequent explanation was that Court Enterprises had borrowed the money and not him.

On February 16, 1997 the client died at the age of 93. Mr. Kohaykewych was retained by the executrix to act on behalf of the estate. Mr. Kohaykewych filed an Application for Probate, and the attached inventory did not list the loans to Court Enterprises as assets of the Estate. On April 30, 1998 Mr. Kohaykewych filed a revised inventory that included two additional assets – one of which was the outstanding Court Enterprises loan valued at \$52,000.00.

In December 2000 a lawyer on behalf of one of the beneficiaries requested an accounting of the Estate. Repeated requests were made for an accounting by various lawyers and the executrix, and when none was forthcoming the executrix terminated the retainer in November 2005. Pursuant to Queen's Bench Rules 74.14(4) allowable fees for the estate without obtaining consents of the executrix and beneficiaries amounted to \$4,100.00. In fact, accounts totalling \$10,250.00 were rendered and paid from trust during 1998 and 1999. In 2005, Mr. Kohaykewych obtained consents from the executrix and the beneficiaries to a fee of \$7,500.00.

The matter came to the attention of the Law Society during a routine spot audit in 2004. The Law Society sought information about the Court Enterprises loan by letter dated September 20, 2005. The Law Society continued to request information about the loan and when no information was forthcoming, in March 2006 the member was required to appear before the Complaints Investigation Committee. Mr. Kohaykewych was unable to provide any specific details about the loan, but did indicate that it had been paid in full. During a second hearing before the Complaints Investigation Committee on March 23, 2006, the Committee requested documentation in order to confirm the assertion that the loan had been paid.

After further investigation, it became clear that the only documentation that could be produced was the unsigned mortgage for \$30,000.00 with no documentation of the \$22,000.00 loan.

Plea

Mr. Kohaykewych entered a plea of guilty to 11 counts of Professional Misconduct.

Decision and Comments

The panel found the evidence established that the beneficiaries and executrix had repeatedly requested an accounting but that Mr. Kohaykewych never complied with these requests. He had

charged fees in excess of that permitted by the Queen's Bench tariff and did not inform the executrix that he had already charged fees of \$10,250.00 when he subsequently sought her consent to fees for \$7,500.00. Mr. Kohaykewych was not forthright with the Complaints Investigation Committee. The inventory as originally filed, was incorrect when the Application for Probate was filed. Every action by Mr. Kohaykewych in respect of the loans to Court Enterprises was improper. The panel found that he ought to have sent his client for independent legal advice prior to her signing the Direction which authorized the loans, he ought to have documented the loan and ensured that his client was made aware of all the terms and conditions, and he ought to have placed a mortgage on his office building property as was contemplated and indicated in the Direction. His failure to do this left his client as an unsecured creditor. Finally, he ought to have paid the loan as required and not preferred his own financial interests over the interests of his client. The panel was extremely concerned that the only documentation that existed related to the \$30,000.00 loan. They expressed concern that once the \$22,000.00 loan was obtained, no adjustments in the payment schedule took place, which put the client at great risk. The panel noted, however, that while the paperwork for the loans was essentially non-existent, the facts showed that Mr. Kohaykewych had started out by assisting his client. He had tried to put her in an investment that was paying higher interest than she was then receiving. He had her sign a Direction, albeit without independent legal advice. He recorded the debt on the Court Enterprises books and had some communication with his client. He did ultimately report the debt on the probate form and he did make more than \$87,000.00 in payments on account of the loan.

Penalty

The panel considered ordering that Mr. Kohaykewych be disbarred; however, given all the circumstances, including his 35 year legal career and the fact he had no formal discipline history, they imposed a period of suspension from the practice of law for a period of one year commencing June 1, 2010. Upon reinstatement, Mr. Kohaykewych must practice for two years under the supervision of a lawyer approved by The Law Society of Manitoba under such terms and conditions as may be set by the Chief Executive Officer of the Society. The panel further ordered that Mr. Kohaykewych pay costs in the sum of \$55,000.00 and that he not be entitled to apply for a practicing certificate until \$10,000.00 of the costs have been repaid to the Society.