



DISCIPLINE CASE *DIGEST*

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Case 94-11

THEODORE PATRICK BESKO
Winnipeg, Manitoba

Called to the Bar
September 23, 1963

Particulars of Charges
Professional Misconduct (15 counts)

- misappropriation of trust funds
- failing to provide Form 74AA
- excessive fees
- taking fees without rendering a bill

Date of Hearing
August 15, 1994

Panel
Douglas Yard, Q.C. (Chairperson)
Gregory Hawrysh
Bruce Miller, Q.C.

Disposition

- disbarred
- \$7,200.00 costs

Counsel
Daniel Dutchin for The Law Society of Manitoba
William Olson, Q.C. for the Member

Misappropriation

Facts

Mr. Besko, who was called to the Bar on September 23, 1963, appeared before the Discipline Committee of The Law Society of Manitoba on August 15, 1994.

Mr. Besko was a sole practitioner and acted on behalf of a number of clients with respect to estate and general matters.

While acting on an estate matter, he failed to provide the beneficiary of the estate with a copy of Form 74AA as required by the Queen's Bench Rules.

While acting on another estate matter, Mr. Besko misappropriated monies held in trust for the estate in an amount in excess of \$18,000.00. Mr. Besko stated this amount was for fees, but it was determined that in relation to the assets of the estate the allowable fees that would be payable to him as a lawyer were slightly in excess of \$2,000.00. He also failed to provide the personal representative of the estate with a copy of Form 74AA.

On another estate matter, Mr. Besko misappropriated monies held in trust for the estate in the amount of \$10,000.00. These monies had ostensibly been taken as fees however, pursuant to the Queen's Bench Rules the allowable fees would have been \$1,400.00. He also failed to provide a copy of Form 74AA.

While acting on another estate, Mr. Besko took fees in excess of those provided for in the Queen's Bench Rules based on the value of the estate. In this particular estate, he charged fees that were approximately \$2,300.00 in excess of the allowable fee. He also failed to provide the personal representative with a copy of Form 74AA.

While acting for clients with respect to the purchase of some property, Mr. Besko misappropriated funds in the amount of \$4,000.00 from his trust account.

While acting for another client with respect to the sale of some property, he again misappropriated monies in excess of \$2,400.00 by withdrawing those funds from his trust account without the authority of his client.

Mr. Besko, while acting for a client with respect to the purchase of some property, misappropriated monies held in trust by withdrawing those monies in the amount of \$950.00 without the authority of his client. While acting for another client in respect to a sale of property, he withdrew monies in the amount of \$1,100.00 from trust for fees without a bill for such fees being prepared and sent to his client at the time the money was withdrawn.

While acting for a client with respect to a sale of property, he misappropriated client trust funds in the amount of \$2,650.00 when he transferred those funds to the "fee trust account" created by him without the authority of his client.

While acting for another client with respect to the sale of property, he withdrew monies from his trust bank account to pay himself for fees and disbursements without bills for such fees and disbursements being sent to his client at the time the monies were withdrawn. The total value of the monies taken in this fashion were in excess of \$4,600.00.

On another file dealing with the sale of property, he misappropriated \$1,000.00 by transferring these monies on two occasions from trust without the authority of his clients and then used those monies for some unrelated purpose. In this matter Mr. Besko returned a portion of the monies to the client trust account.

Finally, while acting with respect to another estate matter, he withdrew monies from his trust bank account to pay himself for the recovery of fees and disbursements without bills being prepared and sent to his client at the time the monies were withdrawn. The total amount of the monies was in excess of \$9,400.00.

Comments of the Discipline Committee

Mr. Besko pled guilty to all of the charges. The Committee was satisfied that the facts contained in each count amounted to professional misconduct.

The Committee noted that there were four categories of offences to which Mr. Besko had pled guilty. The first category of offence was the failure to provide the personal representatives of residual beneficiaries in estate matters with copies of Queen's Bench Form 74AA. There were four such offences of this kind.

The Committee noted that no explanation was provided for these four offences, but also that counsel had submitted that Mr. Besko was competent to practise in this area of law. The Committee observed that competence implied knowledge of the Rules and obligations and therefore inferred that Mr. Besko, with knowledge and intent, failed to comply with that Rule.

The Committee considered this a serious matter because it created an environment in which an uninformed client would not have the necessary knowledge to make an informed judgment about the fees. The Committee also felt that this had enabled Mr. Besko to engage in the irregular accounting and billing practice that had occurred.

The second category of offences involved charging fees in excess of those permitted by the Court of Queen's Bench Rules with respect to estate matters. The Committee noted that there were three counts in this category and that each of these was facilitated in some way or another by Mr. Besko's failure to provide Form 74AA to the clients. They also noted that in some cases Mr. Besko had failed to provide interim accounts as a result of which the clients were unaware of what was going on. The Committee also noted the fact that there had been a repayment by Mr. Besko of the excessive fees by the time of the hearing.

The third category of offences involved the breach of Law Society Rule 129(1)(c) which prohibits the withdrawal of client trust funds without rendering and delivering an account to

the client at the time of the withdrawal. The Committee had been advised that Mr. Besko used what he called a "fee trust account." The monies had first been transferred to this account and then withdrawn. The Committee noted that such a trust account was irregular and inconsistent with the Rules of the Society. They noted that the clients were not informed that their funds were going to a merged account that was used by Mr. Besko for fees.

The fourth category of offences involved misappropriation of trust funds. The Committee noted that there were seven counts amounting to a total of approximately \$40,000.00. The Committee accepted the representation by counsel that the misappropriation of these funds did not amount to embezzlement or theft. They noted, however, that the monies were taken without the knowledge or authority of the clients and that these funds were moved to Mr. Besko's "fee trust account" which was his drawing account. The Committee also noted at the time the Law Society Auditor became involved, this fee trust account was short \$17,000.00. Mr. Besko had to borrow this amount in order to repay his clients.

The Committee was told that Mr. Besko blamed his poor accounting practices for the irregularities which occurred. The Committee, however, observed that Mr. Besko had been disciplined previously for similar irregularities in accounting practices in 1988 and further that he ought to have been able to appreciate and understand the absolute requirement to keep a set of books in accordance with the Rules of the Law Society.

Mr. Besko's counsel indicated that Mr. Besko intended never to practise law again and was requesting the opportunity to withdraw from practice. However, the Committee was satisfied that *The Law Society Act* and Rules do not allow for such withdrawal on the basis as submitted.

Findings and Penalties

The Committee decided that based upon all of the counts in the Citation and the circumstances giving rise to the counts, disbarment was the appropriate disposition. The Committee noted that there had been a prior record for similar offences, that there were a significant number of offences before the Committee on this particular occasion and that the public needs and deserves to be protected from members who practise in the way that Mr. Besko did. They also noted that deterrence was an important consideration.

With respect to the matter of costs, the Committee was aware that a custodian had been in place since Mr. Besko's interim suspension in the summer of 1993. They were also apprised of the costs of the audit and other incidental matters. The Committee therefore assessed costs in the sum of \$7,200.00.

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