

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

JOHN HUNTER RESTALL, JR.

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Date of Hearing: February 28, 2022

Panel: Grant Mitchell, Q.C. (Chair)
Donald Knight, Q.C.
Keely Richmond (Public Representative)

Appearances: Ayli Klein, Counsel for the Law Society of Manitoba
Ian Scarth, Counsel for the Member

REASONS FOR DECISION

1. JOHN H. RESTALL, JR. appeared before a panel of the Discipline Committee of the Benchers of The Law Society of Manitoba on Monday, February 28, 2022 pursuant to a Citation dated February 26, 2021. Members of the panel were Grant Mitchell, Q.C., Chair; Donald Knight, Q.C.; and Keely Richmond, Public Representative. Ayli Klein appeared as counsel for The Law Society of Manitoba. Ian Scarth represented Mr. Restall. The hearing was conducted virtually using Zoom technology. One observer requested access to the hearing and attended without participating. Otherwise, only the panel, Ms Klein, Mr. Scarth, Mr. Restall, the Court Reporter and one Law Society staff member attended the hearing.
2. The Citation was filed as Exhibit 1 and a Statement of Agreed Facts was filed as Exhibit 2. No other exhibits were filed.

3. The parties confirmed orally what was stated in the Statement of Agreed Facts, that they did not object to the appointment of any of the panel members, that Mr. Restall is a member of The Law Society of Manitoba and that he is not a Member of any other Law Society. Through counsel, Mr. Restall admitted service of the Citation and waived the formal reading of it and admitted to the allegations contained in it.
4. Mr. Restall admitted that the facts admitted concerning the charges in the Citation constitute professional misconduct.

Background Facts

5. Mr. Restall is 74 years old and has been practising law for almost 49 years, all in the City of Winnipeg. He graduated from the University of Manitoba's Faculty of Law in 1972 and was called to the Manitoba bar in 1973. He practised with Swystun & Co. for the first 17 years of his career and then established his own firm where he has been practising ever since. He practises in several areas. Estate planning and administration makes up 10% of his practice.
6. Mr. Restall has appeared before the Discipline Committee once before, in 1990, where he pleaded guilty to trust account infractions and paid a fine of \$2,000.00 and costs of \$750.00. He has not been disciplined in the intervening 32 years.

Facts Relating to the Citation

7. Mr. Restall prepared a will for the client in 2005 and arranged for its formal execution. That 2005 will benefited the client's children, and Mr. Restall was appointed executor. The client had a different will prepared by lawyer X in 2006 in which the estate was to benefit the client's grandchildren. Mr. Restall was unaware of the 2006 will until after the client's death on January 30, 2020. In 2018 and 2019, Mr. Restall met twice with the client, who confirmed that the 2005 will reflected her testamentary intentions (i.e., the estate was to be divided between her children, not her grandchildren).
8. In March 2020, Mr. Restall met with the client's daughters and they retained him on the estate administration of the 2005 will. Pursuant to that retainer, Mr. Restall attended the client's bank and reviewed the contents of her safety deposit box. In it, he found a copy of the 2006 will. He then met with the client's daughters to show them the copy of the 2006 will and to explain the differences between the two wills. He also informed them of his meetings with the client in

2018 and 2019, and her orally declared intentions. The two daughters believed that the client had forgotten about having prepared the 2006 will, and they indicated that they did not want to be executors and wished to have Mr. Restall, Jr. act as sole executor of the estate.

9. Instead of filing a Notice of Application to seek advice and direction from a judge of the Court of Queen's Bench regarding the 2005 will and the 2006 will, or making inquiries about the location of the original 2006 will, on May 8, 2020, Mr. Restall filed a Request for Probate of the 2005 will. Given that Mr. Restall had knowledge that a copy of the 2006 will existed, Mr. Restall, Jr.'s declaration and affidavit contained erroneous statements; namely:
 - a. In the declaration, Mr. Restall stated that the client's last will had been made on August 26th, 2005; and
 - b. In the affidavit, Mr. Restall swore that the details of the Request for Probate were true to the best of his knowledge and belief.
10. On June 2, 2020, Justice Lanchberry pronounced an Order granting Probate of the 2005 will.
11. In late August 2020, the Law Society opened an investigation into Mr. Restall's conduct in the matter. On September 26, 2020, after having received a copy of the Society's complaint material in this matter, Mr. Restall held a meeting with the daughters, and their respective children (the client's grandchildren who would have benefited under the 2006 will). At that meeting, Mr. Restall advised the grandchildren of the existence of the 2006 will, which made them beneficiaries, and reviewed with them the details of both wills. He provided, for their signature, a drafted "Beneficiaries Agreement" document to sign, which read in part:

"After much thought, the undersigned agree that the Probated Last Will and Testament of August 26, 2005 and the distribution of assets contained therein, more accurately reflect the testamentary wishes of the deceased at or near the time of her death. Therefore, despite *The Wills Act of Manitoba*, we agree that only [the daughters] should inherit from the deceased's estate and, therefore, we release the estate, the executor(s), Messrs. Restall & Restall LLP and John H. Restall, Jr. from any claim or liability in respect to the above estate."

12. Although Mr. Restall was only retained by the daughters and had provided an opportunity for the grandchildren to meet privately, Mr. Restall did not recommend to the grandchildren that they obtain independent legal advice.
13. After being advised of the above circumstances, counsel for the Law Society strongly recommended to Mr. Restall that he refer the estate's beneficiaries to obtain their own counsel, and that he himself seek counsel, which he did.
14. On April 9, 2021, counsel for Mr. Restall filed a Notice of Application to revoke the Grant of Probate of the 2005 will and to remove Mr. Restall as executor of the estate, among other relief.
15. Between April 9, 2021 and July 19, 2021, Mr. Restall filed two affidavits with the Court detailing the background circumstances and passing his accounts as the executor and trustee of the estate. In addition, lawyer X advised the Court that his office was not in possession of the 2006 will as it had been picked up by the client following its execution.
16. By Order of Mr. Justice Edmond on July 19, 2021, Mr. Restall was discharged as executor and trustee of the estate and his accounts in connection with the administration of the estate were passed. Mr. Restall was ordered to:
 - a. provide his client file relating to his meetings with the client and a supplemental affidavit was filed by Mr. Restall on September 9, 2021;
 - b. deliver the original Grant of Probate to counsel for one of the client's daughters, which he did;
 - c. deliver the residual estate funds to counsel for that daughter, which he did;
 - d. disclose his knowledge of the testamentary intentions of the client, which he did.
17. The Order also appointed the daughters as the administrators pending litigation of the estate. Mr. Restall currently has no involvement in the estate and waived any entitlement to legal fees or executor fees in connection with the administration of the estate; however, Restall & Restall (LLP) was awarded the sum of \$444.76 from the estate for disbursements incurred.

Joint Recommendation

18. Counsel for the parties jointly recommended to the panel that Mr. Restall be found guilty of professional misconduct and that he be fined \$7,000.00 and pay costs of the Society in the amount of \$5,000.00, with no other conditions. Counsel made oral submissions in support of that recommendation and generally agreed on the facts and the legal principles and sentencing principles that apply to those facts.

Integrity

19. In its *Code of Professional Conduct*, the Law Society sets out in the Preface the foundational principle of protecting the public in its dealings with lawyers and students:

“In order to satisfy this need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care.”

The Preface to the *Code* later states:

“In order to satisfy this need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care.”

20. In the first substantive chapter of the *Code*, the issue of integrity is addressed:

“2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer’s trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer’s

usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.”

21. In other words, the first principle of the *Code of Professional Conduct* is that lawyers must act with integrity. Deliberately misleading the Court is the antithesis of integrity. Preparing and submitting an affidavit to the Court that asserted that the 2005 will was the client’s last will to the best of Mr. Restall’s knowledge deliberately misled the Court.

Conflict of Interest

22. Section 3.4-1 deals with the lawyer’s duty to avoid conflicts of interest: “A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.” In filing for probate of the 2005 will in which he was the named executor, rather than the 2006 will in which he was not named as an executor, Mr. Restall placed himself in a conflict of interest. His obligation was to provide the Court with the two wills and to seek its direction on how to proceed. Failing to do so, was professional misconduct based in part on conflict of interest.

Principles on Disposition

23. In *Lawyers & Ethics: Professional Responsibility and Discipline*, Gavin MacKenzie, Carswell 2012, Release 3, the author comments on the purposes of discipline proceedings, at page 26-1:

“The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases in which professional misconduct is either admitted or proven, the penalty shall be determined by reference to these purposes.”

24. MacKenzie emphasizes the need to determine the seriousness of a lawyer's conduct and highlights a variety of factors which must be assessed in determining an appropriate penalty, at page 26-44:

“Factors frequently weighed in assessing the seriousness of a lawyer's misconduct include the extent of injury, the lawyer's blameworthiness and the penalties that have been imposed previously for similar misconduct.

In assessing each of the factors the discipline hearing panel focuses on the offence rather than on the offender and considers a desirability of parity and proportionality in sanctions and the need for deterrence. The panel also considers an array of aggravating and mitigating factors, many of which are relevant to the likelihood of recurrence. These aggravating and mitigating factors include the lawyer's prior discipline record, the lawyer's reaction to the discipline process, the restitution (if any) made by the lawyer, the length of time the lawyer has been in practice, the lawyer's general character and the lawyer's mental state."

25. In "The Regulations of Professions in Canada" by James T. Casey, Carswell 2013, Release 1, Volume 2, the author refers to mitigating factors which may be considered in determining an appropriate penalty, at pages 14-6 and 14- 7:

- "1. Attitude since the offence was committed. A less severe punishment may be imposed on an individual who genuinely recognizes that his or her conduct was wrong.
2. The age and inexperience of the offender.
3. Whether the misconduct is the individual's first offence. It has been suggested that the penalty of revocation should be reserved for repeat offenders and the most serious cases.
4. Whether the individual has pleaded guilty to the charge of professional misconduct which has been taken as showing the acceptance of responsibility for his or her actions. However, a refusal to admit guilt is not to be taken as justifying a higher penalty. Hence a person charged with an offence of professional misconduct is entitled to have the case against him or her proven and to make full answer in defence without fear of the threat of increased penalty.
5. Whether restitution has been made by the offender.
6. The good character of the offender.
7. A long unblemished record of professional service."

26. In *The Law Society of British Columbia v. Ogilvy* [1999] L.S.D.D. No. 45, [1999] LSBC 17, Discipline Case Digest 99/25, a discipline panel of the Law Society of British

Columbia laid down some of the appropriate factors which might be taken into account in disciplinary dispositions, at page 10:

- “(a) the nature and gravity of the conduct proven;
- (b) the age and experience of the respondent;
- (c) the previous character of the respondent, including details of prior disciplines;
- (d) the impact upon the victim;
- (e) the advantage gained or to be gained, by the respondent;
- (f) the number of times the offending conduct occurred;
- (g) whether the respondent had acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
- (h) the possibility of remediating or rehabilitating the respondent;
- (i) the impact on the respondent of criminal or other sanctions or penalties;
- (j) the 2013 MBLs 4 (CanLII) 5 impact of the proposed penalty on the respondent;
- (k) the need for specific and general deterrence;
- (l) the need to ensure the public's confidence in the integrity of the profession; and
- (m) the range of penalties imposed in similar cases.”

Submission on Behalf of the Law Society

27. Ms Klein reminded the panel that in the case of a joint submission on penalty, as long as the proposed disposition passes the public interest test, the panel is obliged to accept the recommendation (*R. v. Anthony-Cook*, 2016 SCC 43; *The Law*

Society of Manitoba v Sullivan, 2018 MBL 9). To refine that public interest test, she submitted that unless accepting the joint recommendation would bring the administration of the discipline process into disrepute, or would otherwise be contrary to the public interest, we were bound to accept it. She then presented the Law Society's rationale for the joint recommendation.

28. Ms Klein reviewed the factual circumstances from the perspective of aggravating, neutral and mitigating factors. She argued that the conduct, the breach of integrity and conflict of interest, were serious breaches, making it an aggravating factor. The previous conviction was an aggravating factor, although given the 30+ year time gap, it was only somewhat aggravating. She submitted that the most important consideration was the need for general deterrence, as Mr. Restall was not likely to reoffend, given his genuine remorse and the steps he had taken to correct the situation.
29. As for neutral factors, Ms Klein pointed to Mr. Restall's age and experience. He had many years of compliant practise, but with his experience, including in this practice area, he ought to have known better. It was a neutral factor that Mr. Restall gained no advantage, at least in the end. He asserted a right to administer the estate based on a will that was cancelled by the subsequent will the following year, but this was not like many integrity cases where there was misappropriation or misuse of trust funds. Another neutral factor was the impact on the victims, as the final outcome of the court case is not yet known. There could be some impact, or none.
30. Ms Klein submitted that most of the factors were mitigating. His previous character was good, he had a long, successful career and this was not a pattern but a single file on which errors of judgment were made. Mr. Restall was sincerely remorseful and had done what he could to right the wrongs he had committed, in hiring Mr. Scarth, providing the accounting, waiving any fees for the work that he did perform. He took responsibility for his actions from the moment that he was confronted about them.
31. Ms Klein reviewed the cases on misconduct and joint recommendations and the principles that apply. She provided 4 cases with somewhat similar facts, in all of which fines and costs were the penalties imposed. She said that the normal upper limit for fines was \$10,000.00 and that the recommendation was in the range of that. It was appropriate that there be no suspension because of the guilty plea and the remorse demonstrated. She asked that the panel accept the joint recommendation of counsel.

Submission on Behalf of Mr. Restall

32. Mr. Scarth agreed that his role, like that of Ms Klein, was to convince the panel that the joint recommendation, if adopted by the panel, would not bring the administration of discipline or the Law Society into disrepute. He emphasized the significant costs that Mr. Restall had incurred in setting matters straight, and argued that there had been no actual adverse impact on the parties in the matter, because of the steps Mr. Restall had taken, including all the work on the estate that he had performed, ultimately free of charge. Otherwise, Mr. Scarth agreed in general with the positions taken on behalf of the Law Society. He urged the panel to accept the joint recommendation, consistent with the principles in *Anthony-Cook*.
33. Mr. Restall was invited to speak on his own behalf and he did so very briefly, adopting the comments of counsel and adding that the whole matter had been embarrassing for him and he wished it had never happened.

Decision

34. This panel is obliged, pursuant to *Law Society Rule 5-96(5)*, to make and record a resolution stating which, if any, of the acts or omissions stated in the charge have been proven to the satisfaction of the panel and further, whether or not, by the acts or omissions so proved, the member is guilty of professional misconduct. In this case, upon review of the evidence before it, the panel is of the view that all of the acts or omissions stated in the Citation have been proved and constitute professional misconduct.
35. As to disposition, the panel is prepared to accept the joint submission as contained in the Statement of Agreed Facts and set out above. The panel feels itself bound by the principles in the *Anthony-Cook* case cited above that oblige a panel to follow a joint recommendation except in the most exceptional circumstances. The panel feels, for the reasons submitted by counsel, that the proposed disposition is well within the parameters of what is fair and reasonable, and certainly not excessive, and will not bring the profession into disrepute or otherwise be contrary to the public interest.
36. Accordingly, this panel hereby orders that:
 1. Mr. Restall pay a fine of \$7,000.00;

2. Mr. Restall shall pay \$5,000.00 to the Law Society as a contribution to the costs of the investigation and prosecution of these charges.

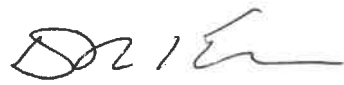
Mr. Restall and his counsel can make arrangements with the CEO of the Law Society regarding payment of the fine and costs.

37. The panel commends counsel for the expeditious resolution of this matter and for the excellence of their submissions.


SIGNED THIS 30th day of March, 2022.



Grant Mitchell, Q.C. (Chair)



Donald Knight, Q.C.



Keely Richmond (PR)