

Vancouver, B.C. (now in the Czech Republic)
Called to the Bar: January 10, 1980
Non-practising membership: January 1, 1996
Disbarred: November 5, 1999

Discipline hearing panel: January 27-29, February 6 and September 29, 1999
Emily M. Reid, Q.C., Chair, David W. Gibbons, Q.C. and Ralston S. Alexander, Q.C.

Todd R. Follett, for the Law Society
Andrew G. Sandilands, for Mr. Kierans (findings of fact and verdict); and
Mr. Kierans on his own behalf (penalty)

Discipline hearing report indexed as [1999] LSBC 13

Summary

Mr. Kierans charged both executor's fees and legal fees on an estate file although he knew he was not entitled to charge legal fees since the will lacked a charging clause. On two other estate files, Mr. Kierans charged both executor's fees and legal fees for the same services. His conduct in these matters amounted to conduct unbecoming a member of the Law Society. On another estate file, Mr. Kierans misappropriated to his own use \$5,500 that was held in trust for a beneficiary that had not yet been located, and this conduct constituted professional misconduct. The hearing panel found that Mr. Kierans' conduct was calculated, persistent and exploitive of vulnerable people and that he had misled the Law Society in its investigation to cover up his conduct and subvert the outcome. He lacked remorse and an appreciation of the seriousness of his conduct. He was disbarred and ordered to pay \$33,092.22 in costs.

Facts

Charging both executor's fees and legal fees

Y estate: Mr. Kierans was granted letters of administration with will annexed for the estate of Y in 1993, after the court registry found that the clause in the will appointing him executor was too vague. Mr. Kierans charged \$8,403 in executor's fees and \$11,786 in legal fees although he knew he was not entitled to charge legal fees because the will contained no charging clause. He asked one of the beneficiaries to sign a release that approved his accounts. She did so, but without the benefit of legal advice. Mr. Kierans later told the beneficiary she could not question his entitlement to legal fees because of

the waiver she had signed. Mr. Kierans also suggested he had authority to charge legal fees based on an unrelated clause in the will.

After receiving his own advice from a lawyer, Mr. Kierans cancelled his original accounts because there was no charging clause on which he could rely. Nevertheless, he attempted to persuade the beneficiaries that he should receive legal fees. He provided them with two forms of release, one of which included the legal fees and one of which did not. Two of the three beneficiaries opted to approve accounts without the legal fees.

J Estate: While serving as administrator with will annexed respecting J estate in 1992 and 1993, Mr. Kierans billed for executor's fees of \$17,420 and legal fees of \$16,000. He did so relying on a charging clause in the will. In his legal bills, he included some services that were properly the services of an executor/administrator. His total compensation on this estate was more than 8% of its value even though the issues in question were straightforward. The executor's fees he charged were essentially a bonus, given that he had been fully compensated through his legal fees.

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Mr. Kierans charged 4.5 to 5% in executor's fees on these estates although no such rate could be justified on the basis of the difficulty or complexity of the estate. Mr. Kierans took advantage of the fact that there were foreign beneficiaries who would have no way of judging the appropriateness of his fees.

R estate: While serving as administrator with will annexed of R estate in 1993, Kierans charged both executor's fees and legal fees under a charging clause in the will. Mr. Kierans recorded time and charged legal fees for a number of functions that would generally be considered executor's work. Mr. Kierans also asked the guardian of an infant beneficiary to waive the passing of accounts, rather than providing those accounts to the Public Trustee as required.

Misappropriation

Mr. Kierans' law firm did legal work on the estate of P, most of which was carried out by other lawyers under his general supervision. The initial distribution of the residue of the estate was completed in 1989, but one of the estate beneficiaries could not be located. As of March, 1990 Mr. Kierans' law firm held approximately \$6,300 for the missing beneficiary.

After having received her share, the administrator of the estate (who was also one of the beneficiaries) was not interested in completing the estate work. One lawyer in Mr. Kierans' firm, in attempting to complete the matter, suggested the firm seek an accounting and then pay into court the money held in trust for the missing beneficiary.

On December 21, 1990 Mr. Kierans prepared an "interim statement of account" for \$5,500 on the P estate file, but he never sent it to the executor. He in fact prepared this account to give the payment the appearance of legitimacy as the firm had not provided

any significant legal services other than those previously billed. Mr. Kierans misappropriated the \$5,500 from trust and used it for his own personal purposes to pay off a pressing creditor's claim.

This misappropriation came to light in the course of a Law Society investigative audit. In his explanation of the \$5,500 billing on the P estate file, Mr. Kierans misled the Law Society. He did so by stating that the executor and her son had told him that the missing beneficiary had likely predeceased the testator and by stating that the firm was billing for outstanding legal work. Both these statements were untrue.

Decision

Mr. Kierans' conduct in charging both executor's fees and legal fees on Y estate when he knew he was not entitled to do so constituted conduct unbecoming a member of the Law Society. (The panel found, however, that Mr. Kierans — when acting as an executor — did not have higher duties than a non-lawyer executor on these estate files. For that reason he was not obliged to advise the beneficiaries of the range of executor's fees or advise them to obtain independent legal advice.)

Mr. Kierans' conduct in charging both executor's and legal fees for the same services on the estates of J and R when he knew he was not entitled to do so constituted conduct unbecoming a member of the Law Society.

Mr. Kierans' conduct in misappropriating for his own use \$5,500 held in trust for P estate constituted professional misconduct.

Penalty

The hearing panel found Mr. Kierans' conduct as calculated, persistent, arrogant and exploitive of vulnerable clients.

His misappropriation from money held in trust for P estate was a breach of the most fundamental obligation of trustworthiness and was extremely serious. Furthermore, Mr. Kierans testified that he had attempted to mislead the Law Society in its investigation in order to close the investigation, to cover up his conduct and to subvert the outcome.

As a result of Mr. Kierans' actions, the estates did not receive appropriate legal services for the fees charged. In two of the estates, matters were never completed. One beneficiary in P estate was essentially disinherited by reason of Mr. Kierans' misappropriation. On the J and R estate files, on which Mr. Kierans double-billed, all of the beneficiaries received less than they were otherwise entitled. Mr. Kierans made restitution on none of these matters.

The panel saw no prospect of remediating or rehabilitating Mr. Kierans. As indicated by his continued denial of wrongdoing and his aggressive and confrontational approach to the panel, Mr. Kierans lacked appreciation for the seriousness of his conduct.

After considering all the factors appropriate for determining penalty, the hearing panel ordered that Mr. Kierans:

1. be disbarred; and
2. pay \$33,092.22 as costs of the discipline proceedings.*

* The panel declined to charge the costs for in-house Law Society at the same scale as if the Society had retained outside counsel, despite the provisions of section 46(2) of the *Legal Profession Act*.

Discipline Case Digest — 2000: No. 4 April (Kierans)