

DISCIPLINE DIGEST

The Society of Notaries Public of British Columbia

March 2009

RALPH FOSSUM

Ralph Fossum
Commissioned: June 1988

Panel: Tiah Workman, Kenneth Sherk, William Anderson, Patricia Fedewich, Tammy Hoolsema Morin, Christopher Dupuis, John Eastwood, Scott Simpson, Michael Kravetz, Brent Atkinson

Background:

This was an inquiry pursuant to s. 27 of the *Notaries Act* to report findings as to whether the member was guilty of any of the conduct described in s. 28(1) as:

- a) professional misconduct;
- b) a breach of a provision of the Act or a regulation or rule made under it, or of a bylaw of the Society.

In addition, pursuant to s. 28(2), the panel inquired into whether the member engaged in conduct that ought to be reviewed by the directors to determine if it is conduct that in the opinion of the directors is contrary to the best interests of the public or the profession or tends to harm the standing of the notarial profession.

Mr. Fossum was present at three separate hearings into the matter. In one hearing, the member was represented by counsel; in the other two hearings, the member appeared alone but was receiving advice from counsel.

The Charge:

The Notice of Inquiry sent to the member in December of 2007 alleged that Mr. Fossum breached Rule 10 of the Rules of the Society and Sections 9, 10 and 11 of the Code of Ethics of the Society by failing to comply with an undertaking. The undertaking in question was given by Mr. Fossum as part of a settlement of a discipline hearing.

History leading to the Charge:

The Society and the Member settled an earlier disciplinary matter by way of an agreed statement of fact and penalty. The agreement in that settlement confirmed:

- that the member was (at that time) under suspension as a result of the alleged professional misconduct;
- that the Member suffered from the disease of alcoholism;
- that his disease affected his ability to adequately carry on his practice;
- that his conduct was contrary to the best interests of the public, the notarial profession, and tends to harm the standing of the notarial profession and that it is professional misconduct;

The Society then agreed to reinstate the Member on condition that he undertake various things and that he would voluntarily resign his commission if he failed to comply.

In December of 2007, the Member refused to comply with one of the matters he undertook to do. The Member was suspended from practice. The Member did not resign his commission. The Notice of Inquiry was then sent to the Member alleging breach of undertaking.

The Member argued that the undertaking given by him was not a “notarial” undertaking. The panel found that, given the Member’s long experience as a notary public, the fact that he intended the undertaking to settle a discipline complaint and the fact that his undertaking was relied upon by the Society to settle that complaint allowing him to resume his practice, he could not later complain that he did not intend for it to be binding on him any less than any other undertaking. Undertakings and the understanding of the significance of them are fundamental to the practice of a notary public.

After hearing the oral and written submissions made, the Inquiry panel decided that Mr. Fossum breached an undertaking to the Society to resign his commission.

Penalty Hearing:

The Board of Directors met on two occasions regarding the Report of the Inquiry Panel. At the first hearing, the Member provided considerable submissions on his behalf. His position was essentially as follows:

1. that the original charge didn’t specify that the undertaking he breached was failure to resign, but rather failure to comply with sobriety testing and failure to refrain from drinking;
2. that although he did relapse, seeking to have him undertake not to drink alcohol was unreasonable at the outset;
3. that his relapse was caused by the Society’s publication of his discipline resolution on the Society’s public website and that the Society had thereby, though not maliciously, interfered with his ability to comply with his undertaking;
4. that he was prepared to resign and remained prepared to resign provided his resignation could be timed to coincide with his plans for his practice;
5. that the public is in no danger as a result of his not complying with the terms of his undertaking.

The Board of Directors in the first penalty hearing accepted the discipline inquiry panel’s finding that Mr. Fossum breached and remained in breach of the Society’s Rules for failing to comply with his undertaking. They gave the following reasons:

1. Mr. Fossum made specific submissions dealing with the fact that he didn’t think he had been charged with failing to resign. It was clear to the Board panel that Mr. Fossum did not dispute breaching the undertaking, including the undertaking to resign. He told the Board that on several occasions, even offering another agreement to resign in the future. His issue was the timing of a resignation.

2. The Board found it difficult to see how the undertaking could be considered unreasonable. Mr. Fossum agreed at the time that his conduct was contrary to the best interests of the public. Mr. Fossum was under suspension at the time and the lifting of that suspension would have required significant preventative measures to have been put in place.
3. The Board did not accept Mr. Fossum's statement that publication of his discipline matter caused the breach. Mr. Fossum repeatedly stated that he was prepared and remained prepared to resign, but wished to address the timing. As far as the timing was concerned, Mr. Fossum admitted in his previous discipline matter that his condition gave substantial grounds for concern; he was under suspension when he resolved that matter and knew therefore that it was being treated very seriously.
4. As to Mr. Fossum's submissions regarding the effect his actions have on the public, the Board left that matter for the forthcoming penalty hearing.

Accordingly, the Board found Mr. Fossum liable for failing to comply with his undertaking and ordered a penalty hearing.

Penalty Hearing:

The Board of Directors met again to determine what an appropriate penalty would be in this matter. The Board heard from and received written submissions from the Society. The Society's position essentially boiled down to a submission that Mr. Fossum's membership ought to be terminated because Mr. Fossum had acknowledged his ability to serve his clients is affected by his problem with alcohol. The Board further heard that his breach of undertaking demonstrated the failure of 12 years and four disciplinary hearings' worth of attempts to accommodate Mr. Fossum's intention to remedy the problem.

Mr. Fossum provided considerable submissions on his behalf including written and oral comment on the Society's submissions, his own written and oral submissions, and a written and oral summation. Mr. Fossum's submissions were:

- a. The undertaking that was breached was obtained from him under duress and insofar as it attempted to regulate his health and disease, was unconscionable;
- b. He had effectively already been suspended for a year largely as a result of the Society's actions (or inaction) and suffered the accompanying loss of income;
- c. The Society had a duty to accommodate his disability rather than to punish him;
- d. He had always acted with his clients' best interests at heart and no client had suffered as a result of his problem;
- e. He is a well respected member of his community;
- f. The discipline process of the Society, particularly publication of discipline results, had a negative effect on his recovery program.

Decision of the Directors

The Board of Directors unanimously resolved to terminate Mr. Fossum's membership, for the following reasons:

1. The *Notaries Act* provides very limited means to address breaches of discipline. In Mr. Fossum's case, he had been suspended on a number of occasions. That would generally be considered to be the most serious of the penalty choices available, short of termination. It was evident to the Board that despite attempts going back over the course of 12 years and despite Mr. Fossum's consistent claim to understand that his alcohol problem posed a threat to his clients, he proved unable to successfully deal with it.
2. Mr. Fossum's discipline history indicated that in fact he had so many attempts to rehabilitate his situation that the Board was of the view that future breaches are likely.
3. In his submissions regarding the consequences of his breach, Mr. Fossum asked "Who was harmed?" Clients are harmed by time delays and the stress of not being kept informed and the uncertainty of whether their transactions are being dealt with properly. Mr. Fossum himself admitted that his alcohol problem presented a danger to the public and the Board cannot, in the face of that, responsibly wait for some specific calamity to befall a client.
4. On more than one occasion during his submissions, Mr. Fossum stated that he did not know what he did wrong. The Board feared that Mr. Fossum had not really come to terms with accepting responsibility for his dealings with and commitments to the Society.
5. The Board's decision would have been no different had Mr. Fossum presented for any reason a real probability he might again fail to diligently manage his practice.
6. It appears that Mr. Fossum enjoys the respect of his community and that he has operated his practice in his clients' best interest to the extent he has been able to control his disease. The Board's decision is not based on a belief that Mr. Fossum is a bad person but rather with an eye to the Society's primary goal of protecting the public. As all other attempts have failed, the Board regretfully concluded termination was necessary.

Mr. Fossum was terminated on December 18, 2008.