2009 LSBC 06
Report issued: February 11, 2009
Citation issued: February 5, 2008

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 10

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: September 18, 2008

Panel: G. Glen Ridgway, QC, Chair, William Jackson, Richard N. Stewart, QC

Counsel for the Law Society: Eric Wredenhagen
Counsel for the Respondent: Craig P. Dennis

The Citation

[1] The citation is this matter was authorized by the Discipline Committee on November 15, 2007. It was issued on February 5, 2008. The nature of the conduct to be inquired into stated:

> In the course of your representation of C Ltd. and EA, you swore on personal knowledge an affidavit on March 14, 1996 without ensuring the accuracy of the information sworn in the affidavit.

[2] At the Respondent's request, the Law Society particularized the nature of the conduct to be inquired into by specifying that the " information" referred to in the Schedule to the citation refers to the following statement in paragraph 5 of the Affidavit sworn by the Respondent on March 14, 1996 (" the Affidavit"):

> ...The funds were not paid to the Petitioners.

Paragraph 5 of the Affidavit is repeated in its entirety:

> 5. On July 30, 1993, Mr. Justice S, by order of this Honourable Court, ordered that the sum of $554,879.34 together with interest accruing since the 16th day of March, 1993, be paid out of the Trust account of [law firm N] to the Petitioners. The order of Mr. Justice S was entered on September 24, 1993. *The funds were not paid to the Petitioners.*
>
> *[emphasis added]*

[3] The Panel finds that this particularization must be read together with paragraph 1 of the Affidavit which modifies or adds to each of the paragraphs of the Affidavit that follow (including paragraph 5).

[4] When paragraph 1 and paragraph 5 are read together, the statement that forms the basis of the conduct to be examined is:

...I have personal knowledge of the fact (paragraph 1) that ... *The funds were not paid to the Petitioners* (paragraph 5).

[5] The particularization of the conduct that forms the basis of this citation and the limitation created by that particularization is important to the Panel's decision.

[6] Service of the citation is admitted by the Respondent.

The Facts

[7] The evidence at the hearing included:

(a) the introduction of a Statement of Agreed Facts, (" the Statement"); and

(b) the oral evidence of the Respondent, and AM.

[8] The parts of the Statement relevant to the Panel's findings are reproduced as follows**:**

First Court Order: the D Order

6. On November 17, 1992, the petitioners, EA and C Ltd., represented by the law firm N, obtained a Court Order from Mr. Justice D (the " D Order") permitting the sale of certain lands (the " CL Lands") from [number] B.C. LTD. to [number] B.C. Ltd. for a total sale price of $1.6 million.

7. Prior to the sale, the CL Lands had been subject to numerous encumbrances by, *inter alia*, the respondents to the proceeding (the " Claimants") in the form of mortgages, caveats, claims, judgments and certificates of *lis pendens* (as reflected in the D Order).

8. In summary, the D Order provided, among other things, as follows:

(a) title to the CL Lands would pass to the purchaser free and clear of all encumbrances then registered on title;

(b) the sale proceeds of $1.6 million would be applied first to any proper adjustments of the sale, then to the payment of any taxes and arrears of tax, Crown liens, and to certain mortgages as specified in the Order;

(c) the balance remaining after payment of the above amounts would be received and held by the law firm N, in trust, to the credit of the action, and would not be paid out except by further Court Order or the consent of all parties making claim to the funds held in trust.

9. At the time the D Order was obtained, EA and C Ltd. took the position that they held a valid mortgage (the " Mortgage") over funds they had lent to [number] B.C. LTD. However, because the validity of the Mortgage was disputed by the Claimants, the Mortgage was not initially paid out from the proceeds of the sale of the CL Lands. Following the payments required by the D Order, the amount held in trust by N as at March 9, 1993 was $1,094,924.07.

Second Court Order

10. On March 16, 1993, following negotiations with the Claimants, EA and C Ltd. obtained a further Court Order:

(a) declaring that the Mortgage was valid and formed a charge against the funds held in trust by N;

(b) declaring that [number] B.C. LTD. was in default of the Mortgage; and

(c) granting judgment to EA and C Ltd. in the amount of $554,879.34.

Third Court Order

11. On July 30, 1993, EA and C Ltd. obtained a further Court Order ordering that the sum of $554,879.34 be awarded to them pursuant to the Court Order of March 16, 1993, plus interest, be paid to them from the funds held in trust by N.

[9] The Panel notes that the Third Court Order authorizes the payment of a substantial sum and is unconditional.

[10] The evidence at the hearing was that pursuant to the Third Court Order, the funds were actually paid to C Ltd. on August 5, 1993.

[11] The Statement continued is:

Fourth Court Order

12. On January 24, 1994, N obtained a further Court Order varying the D Order and ordering that the remaining funds, which it held in trust following the July 30, 1993 order ($551,858.60), be paid into Court.

13. Payment into Court by N of the remaining $551,858.60 occurred on or about February 24, 1994 with the result that N no longer held any funds in trust from the sale of the CL Lands.

[12] The Panel notes that there is no evidence before it that the remaining amount held in trust by N, set out in paragraph 9 of the Statement, was disclosed during the course of the proceedings that led to the pronouncement of the Second, Third or Fourth Court Orders. The Panel was not provided with the evidence filed in support of the Applications that resulted in those Orders. In the absence of that information it would not have been possible to determine from the record whether, at the time of the hearing of the Fourth Court Order, C Ltd. and EA had been paid the judgment amount.

[13] The Statement continued is:

14. In or about 1993, a shareholder in C Ltd., GQ, retained the Respondent and his firm W to assist in a dispute with EA over shareholdings in C Ltd..

15. The GQ retainer completed later in 1993. Afterwards, W was asked to review the accounts of N in relation to the proceedings related to the CL Lands. With GQ's consent, W took on that new retainer on behalf of both C Ltd. and EA. The W lawyer who had conduct of that new retainer was AC, a litigation partner at W. On September 2, 1993 the Respondent provided an introductory Memorandum to AC.

[14] The Panel notes that this Memorandum references an internal file number " GQ8499" . The Respondent explained in his evidence that file #8499 was a file number that he established in connection with the corporate matters dealing with C Ltd. In particular, those corporate matters were a shareholder dispute within C Ltd. between GQ and EA.

[15] The Respondent's evidence was that the shareholders dispute was settled in late July, 1993. A term of

the settlement was that the proceeds of the mortgage that are the subject matter of the Second Court Order were to be paid to C Ltd. and not EA.

[16] The settlement was therefore concluded before the Third Court Order was made (August 5, 1993).

[17] The Statement continued is:

> 16. Subsequent to the Court Order of January 24, 1994, (the Fourth Court Order) W became counsel of record for EA and C Ltd. for the proceedings involving the CL Lands.
>
> 17. On or about March 17, 1994, a memorandum was prepared by an articled student or junior lawyer identified only as " RSB" for " ALC" , who is understood to be AC. The memo sets out the history and background of the CL Lands foreclosure litigation.

[18] The Panel notes that this memorandum:

> (a) references an internal file number 9188;
>
> > The Respondent explained in his evidence that file #9188 was established by AC in connection with litigation matters for which he had been retained by C Ltd..
>
> (b) Confirms that C Ltd. and EA received the amount ordered to be paid to them pursuant to the Third Court Order.

[19] The Statement continued is:

> 18. In the course of reviewing the N accounts, W discovered that one of the earlier Court Orders granted C Ltd. costs in the foreclosure proceeding. AC was instructed to pursue those costs. He was assisted by a litigation associate at W, DM. On June 13, 1995, AC wrote to the cashier of the Supreme Court in Kelowna enclosing a Praecipe requesting payment out of Court in respect of a Certificate of Costs dated June 12, 1995.
>
> *Ex Parte* Application/Respondent's Affidavit/the B Order
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> 19. In arranging for the payment out of costs from the Kelowna Registry, either AC or DM was advised by the Registry that the funds held in Court were to be transferred to Victoria imminently.
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> 20. As a consequence of this advice from the Registry, a decision was made to seek payment of all remaining funds out of Court.
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> 21. AC and the Respondent advised GQ, as a representative of C Ltd., of the advice received from the Kelowna Registry regarding the transfer of the funds held in Court. GQ advised AC and the Respondent that C Ltd. had never received a payout of the Mortgage funds referred to in the March 16, 1993 Order (the Second Court Order).
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> 22. On March 20, 1996, EA and C Ltd., represented by W, brought an *ex parte* Application (the " Application") to have the funds held in Court, being the balance of the sale proceeds of the CL Lands, paid to them. The Notice of Motion and a Consent to Payment Out to Solicitor were executed by and on behalf of EA and C Ltd.
>
> 23. AC appeared as counsel on the Application for EA and C Ltd.. The Affidavit was relied on in support of the Application.

[20] This Affidavit contained the paragraph 5 that includes the statement that forms the basis of the alleged misconduct.

[21] The Panel notes that the events described in the Statement, paragraph 22 and 23, occurred approximately three years after the Third Order required the payment of funds to C Ltd. and EA.

[22] The Statement continued is:

> 24. At the time the Respondent swore the Affidavit, he believed that the statement in paragraph 5 of the Affidavit that the " funds were not paid to the Petitioners" was true. His belief was based on: (1) the advice of GQ, a representative of his client, C Ltd., that the Petitioners had not received the funds; and (2) AC's advice, and possibly DM's, that they had reviewed the file and the Court Orders. The Respondent did not review the file in connection with his swearing of the Affidavit.
>
> 25. The Respondent acknowledges that the statement, " The funds were not paid to the Petitioners," was incorrect and that the Petitioners EA and C Ltd. had in fact received these funds in February 1994.

[23] The Panel notes that the evidence at the hearing discloses that the funds were paid on August 5, 1993 and not February, 1994. This error in the Statement is not material to the result. Either date is before the Application that resulted in the Fourth Court Order.

[24] The Statement continued is:

> 26. After hearing the Application, Master B made an order dated March 20, 1996 (the " B Order") ordering that the sum of $551.858.60 be paid to EA and C Ltd..
>
> 27. Payment out of Court to EA and C Ltd. was made on or about March 22, 1996.
>
> Events Subsequent
>
> 29. Subsequent to the B Order being obtained, some of the Claimants discovered in or about 1999 that the funds that they believed to be held in Court pursuant to the D Order had, in fact, been paid out. They made complaints to the Law Society and also advised of certain civil proceedings with respect to the funds held in Court, which proceedings had been commenced in or about August 1996. Actions by some of the Claimants naming, among others, W as a defendant were commenced in or about 2000. Their entitlement, if any, to the funds held in Court has yet to be established.
>
> 30. In 1999, counsel for the Respondent and AC, AM, requested an abeyance of the Law Society's investigation, which request was granted, subject to undertakings. Subsequently, AM made renewed requests for continuation of the abeyance, based on the existence of civil proceedings, which requests were granted.
>
> 31. Between 2000 and 2006, the Law Society periodically contacted AM for an update on the status of the civil proceedings, and was advised that proceeding with the disciplinary investigation would risk stirring up the civil proceedings.
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> 32. On September 21, 2006, in response to an inquiry from the Law Society, AM responded by letter stating that " although there had been no activity in the civil proceedings, they should not be considered " dormant" , and that there was a " reasonable likelihood" that any disciplinary activity by the Law Society could reactivate the proceedings.
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> 33. Subsequently, it was decided at a Discipline Committee meeting of November 9, 2006, to reactivate

the investigation into the conduct of both AC and the Respondent.

34. However, by this point, AC had ceased practice. He has been a non-practising lawyer since June 30, 2002, and became a former member on January 1, 2003. It is believed that he is now based in Asia. In the circumstances, the Law Society's investigation against him did not proceed.

The Oral Evidence - the Respondent

[25] The evidence in the Statement was supplemented by the oral evidence of the Respondent.

[26] The Respondent gave evidence that:

1. Since his call to the bar, he carried on a solicitors practice;

2. He had never practised as a litigator;

3. His partner AC was a litigator;

4. The Affidavit was drafted by an associate, DM;

5. DM assisted AC with the review of the documentation necessary in order to prepare the Affidavit;

6. It was the Respondent's understanding that DM's preparation of the Affidavit included a complete review of the file;

7. He read the Affidavit before swearing it;

8. When he swore the Affidavit, he believed that paragraph 5 was true;

9. When he swore the Affidavit, he had no intention to mislead anybody;

10. When he swore the Affidavit, he knew that it was going to be relied on in support of the Court application;

11. It was his impression that, and it was the instructions of his clients, that the funds in Court belonged to his client;

12. He believed that the funds in Court were going to escheat to the Crown and there was a very short time-frame to have those funds released from Court;

13. He could not form a judgment on whether the funds would escheat because he had no knowledge of or expertise on this subject. He deferred to AC's advice that an escheatment would occur;

14. Neither EA or GQ (a current representative of C Ltd.) were available to swear the Affidavit within the time period required;

15. He knew that the Application was going to be brought *ex parte*;

16. It was AC's decision to bring the Application *ex parte*;

17. AC explained to him that, as a result of both the abbreviated time period and the fact that all he was doing was enforcing a previously delivered judgment, there was no need for notice;

18. He based his statement in paragraph 5 on:

(a) the direct statement from GQ that the funds had not been paid to C Ltd. and that the funds remained due and owing to C Ltd.. He also stated that GQ had given him an explanation as to why no effort had been previously made by C Ltd. to obtain the funds namely that:

> there were so many claims against the amount that the Company would not receive the proceeds.

(b) the information he had received from AC after AC's review of the file;

(c) AC's advice to him that he had spoken to EA who had confirmed that the funds were owing.

19. He contacted GQ in order to verify what AC had told him that the funds had not been paid to C Ltd.

20. He contacted GQ because he believed he was his contact with C Ltd. and that he was the appropriate person to be speaking on behalf of C Ltd.;

21. It was a mistake that the statement in paragraph 5 was not expressed to be on information supplied by GQ and not something he deliberately left out of the Affidavit;

22. At the time he swore the Affidavit, he was aware of the distinction between facts and matters based on personal knowledge and facts and matters based on information and belief;

23. At the time he swore the Affidavit, he did not know the verbal formula conventionally used in an Affidavit to identify a statement that was being made on information and belief;

24. He was present in Court when AC spoke to the Application that resulted in the Fourth Order;

25. It was an unusual practice for him to attend Court. On this occasion he attended because there was a very short time-frame and no margin for delay. He attended in case there was any question that may arise on a technical solicitor's matter;

26. He cannot recall what AC said to the Court at the time of the hearing of the Application;

27. The firm file #9188 was a file opened by AC in conjunction with the matters that he was dealing with for C Ltd...

The Evidence Regarding AC's Submission in Support of the Fourth Court Order

[27] The Respondent sought to introduce evidence of the submissions made by AC in support of the Application that resulted in the Fourth Court Order through the evidence of AM.

[28] AM stated in his evidence that AC told him that during the course of his submission to Master B:

> he advised Master B that the statements that the Respondent made in his Affidavit, which were framed in the Affidavit as though the Respondent had personal knowledge of the information, ... were made on the basis of information and belief.

[29] AM's evidence of what AC said to him is hearsay evidence.

[30] Counsel for the Law Society objected to the introduction of this evidence.

[31] The Panel allowed the Respondent to introduce this evidence and reserved its decision as to the weight (if any) that it would give to this evidence.

[32] Having considered this evidentiary issue, the Panel is not prepared to give any weight to this evidence.

[33] In any event, this evidence is also irrelevant to the issue to be determined at this hearing.

[34] The issue in this hearing relates to the conduct of the Respondent in the swearing of the Affidavit prior to the time AC made his submissions at the hearing. There is no evidence that the Respondent sought to correct or qualify his Affidavit at the hearing through the submission of AC. His conduct is not excused if his evidence was subsequently and independently corrected by the submissions of AC at the hearing.

The Evidence of the Respondent

[35] The Panel was impressed by the Respondent.

[36] The evidence of the Respondent was, in every respect, given in a candid, straightforward and honest manner.

[37] His evidence was not self-serving. He readily admitted the mistake that he made.

[38] He expressed, and his evidence at the hearing demonstrated, genuine remorse for this mistake.

[39] He does not feel, however, that this single mistake constitutes professional misconduct.

What is Professional Misconduct

[40] The Panel relies on the test for professional misconduct stated by the Panel in *Law Society of BC* v. *Martin*, 2005 LSBC 16, namely:

> [170] The Panel finds that the real issue is not whether the behaviour complained of can be described as a single act, or a series of acts, and whether it is labelled as gross negligence or not.
>
> [171] The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[41] The conduct under consideration may or may not be a breach of a Rule of professional conduct. In other words, conduct amounting to professional misconduct can occur when there is no breach of a Rule of professional conduct.

[42] The Courts have said that the Law Society, and the Panel in this case, are the persons best qualified to determine what conduct it expects of its members and whether the Respondent's conduct in this case is a marked departure from this standard.

[43] The Respondent refers the Panel to *Re: Lawyer 3*, 2005 LSBC 35, a decision of the Benchers of the Law Society of British Columbia on Review of a Panel decision, reversed on appeal 2007 BCCA 96, and the words of the Benchers:

> [29] Counsel for the Respondent referred us to various text and authorities as to what constitutes professional misconduct. In particular, we were referred to Gavin MacKenzie's book, *Lawyers and Ethics, Professional Responsibility and Discipline*, 3rd Edition, 2001; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869; and *Reddoch v. Yukon Medical Council*, [2001] Y.J. No. 132. The thrust of those authorities and Mr. MacKenzie's book was that moral turpitude was an

essential component of professional misconduct. Mere negligence, a single mistake, even of serious character, will not suffice in being regarded as disgraceful or dishonourable conduct of a nature to be defined as professional misconduct.

[30] While there appears to be little, if any, judicial authority or rules specifying the circumstances relating to the swearing of Affidavits and, in particular, the appending of exhibits thereto, a practice and convention has developed in British Columbia, which this Review Panel believes is appropriate. That practice is to have all exhibits before the maker of the Affidavit at the time of the making of the Affidavit, in order that the deponent can review same and swear that they are correct. The Courts are entitled to be ensured to the highest degree possible that matters being placed before them as evidence are done so with maximum certainty.

[31] The approach adopted by the Respondent with respect to the Affidavit in question departs significantly from the practice that this Panel believes is appropriate with respect to exhibits to Affidavits for use in our Courts. The manner in which this Affidavit was taken and the exhibits purported to be sworn was incompetent and contrary to the accepted practice. However, while the Respondent's approach is far from acceptable, we are of the view that his conduct, in these circumstances, does not amount to professional misconduct. His procedure, while sloppy, misinformed or confused, lacks the degree of dishonorable conduct or moral shortcoming necessary to be viewed as professional misconduct.

[44] The test for professional misconduct in *Re: Lawyer 3* (*supra*), included:

1. an essential requirement for a finding of moral turpitude that went beyond mere negligence;

2. the conduct must be regarded as disgraceful or dishonorable conduct and mere negligence based on a single mistake, even of a serious nature would not suffice.

[45] The Panel notes that the decision in *Law Society of BC v. Martin* was also relied upon by the Respondent. The Panel finds that the test for professional conduct expressed in *Martin* is a wider test than that expressed in *Re: Lawyer 3*.

[46] This Panel finds that the wider test determined and followed in *Martin* is to be preferred over the narrower test determined by *Re: Lawyer 3*.

[47] The cases relied upon by the Law Society that refer to other types of errors and conduct of other lawyers with respect to the preparation, swearing or reliance upon Affidavits in Court can be distinguished from this case on their facts and are not relied on by this Panel in reaching their decision.

Analysis

[48] This is a case in which the Respondent is criticized for his swearing of an Affidavit.

[49] The Panel repeats the words of the Hearing Panel in the *Law Society of BC* v. *Hart*, 2007 LSBC 50:

[9] It must be understood by all members of the profession that great care must be taken in preparing affidavit and making representations to the Court to ensure accuracy. ... The Courts and the public must have confidence that lawyers are scrupulously fulfilling their duties in this regard. ...

[50] This Panel adds that a lawyer is an officer of the Court and when that lawyer is the deponent to an Affidavit (a sworn statement) that will be relied on in Court, the lawyer must conform to the highest standard

of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.

[51] The Respondent swore in the Affidavit that he had personal knowledge of the fact that the funds had not been paid out. He acknowledged that:

(a) he read the Affidavit before swearing it; and

(b) he understood the difference between a statement made on personal knowledge and one made on information and belief. The words of the Affidavit are clear, and there is no necessity to be familiar with how the form of an Affidavit is drafted to reflect that difference.

[52] When the Respondent chose to swear the Affidavit on personal knowledge, then in order to meet the standard expressed in paragraph [40] of these reasons, the Respondent must personally have made all of the inquiries that were available to him in order to be able to make this statement.

[53] The Respondent cannot rely exclusively on the inquiries of, or the information supplied by other third parties. In particular, the Respondent cannot rely upon the information of third parties (in this case GQ) who had a financial interest in the result of the Application.

[54] The extent of his inquiry was made more stringent by the fact that:

1. the Respondent recognized the circumstances were " bizarre" . In particular, the Court had, in the Third Order pronounced almost three years previously, made an unconditional Order that the substantial sum of $554,879.34 be paid to C Ltd. and EA.

2. GQ's explanation as to why the funds had not been paid out some three years later was not credible (see paragraph [26] - 18(a) of these Reasons). The order for payment out was unconditional and not dependent on other claims to those funds.

3. the Respondent knew the application was intended to be made *ex parte* (without notice to the other interested parties).

[55] In the circumstances of this case, this Panel finds that, in order to meet the appropriate standard of conduct, the Respondent should have personally made inquiries to ensure that the funds had not been paid out. For example the Respondent should have contacted the former Trustee of those funds at the time the Third Order was made, namely the law firm of N, to determine if the funds had been paid out, and if not, why not.

[56] The Respondent's failure to make this essential inquiry resulted in the Respondent's conduct being in marked departure from what the Law Society expects of its members.

Decision

[57] The Respondent's conduct in swearing paragraph 5 of the Affidavit constitutes professional misconduct.