

2010 LSBC 10

Report issued: May 06, 2010

Oral Reasons: March 31, 2010

Citation issued: October 1, 2009

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

James Hu

Respondent

Decision of the Hearing Panel

Hearing date: March 31, 2010

Panel: David Renwick, QC, Chair, Rita Andreone, Peter Lloyd

Counsel for the Law Society: Maureen Boyd

Appearing on his own behalf: James Hu

Background

[1] The citation in this matter was authorized by the Discipline Committee on July 9, 2009 and was issued against James Hu (the " Respondent") on October 1, 2009. The Schedule to the citation was amended pursuant to Rule 4-31(2)(a) of the Law Society Rules (the " Rules") on February 5, 2010 and sets out the nature of conduct of the Respondent to be enquired into:

1. In your Trust Report for the period ending March 31, 2008, you represented to the Law Society that the books and records of your practice complied with the requirements of the [Rules] by giving inaccurate answers to several questions in section C, when to your knowledge those answers were not true.
2. In your Trust Report for the period ending March 31, 2007, you represented to the Law Society that the books and records of your practice complied with the requirements of the [Rules] by giving inaccurate answers to several questions in sections B and C, when to your knowledge those answers were not true.

[2] The citation and amended citation were served on the Respondent, as required by the Rules.

[3] This matter came before the Panel pursuant to Rule 4-22 which provides for, *inter alia*, the Discipline Committee to accept a conditional admission of a discipline violation(s) and proposed disciplinary action. That Rule requires a hearing panel to consider the proposal and impose the proposed disciplinary action if it agrees that it should be accepted.

[4] In this case, the Respondent made a conditional admission and proposed a penalty of \$7,500 and costs of \$2,000. The Discipline Committee accepted the admission and proposed disciplinary action.

[5] At the hearing, an Agreed Statement of Facts (ASOF) was marked as an Exhibit, as was a letter dated February 18, 2010, from the Respondent in which he admitted the discipline violation and consented to the proposed disciplinary action.

[6] A summary of the relevant facts as set out in the ASOF is as follows:

1. The Respondent was admitted to the Bar of the Province of British Columbia on May 19, 2000 and, since April 1, 2001, has been practising as a sole practitioner in Richmond, BC.
2. In 2007 and 2008, the Respondent's practice was primarily real estate transactions as well as some corporate law and commercial lending transactions.
3. On or about June 29, 2007, the Respondent prepared and submitted his Trust Report for the period ended March 31, 2007 (the " 2007 Trust Report"). The Respondent certified that all of the information in the 2007 Trust Report was " true and accurate" .
4. On or about June 28, 2008, the Respondent prepared and submitted his Trust Report for the period ended March 31, 2008 (the " 2008 Trust Report"). The Respondent certified that all of the information in the 2008 Trust Report was " true and accurate" .
5. On April 14, 2008, a compliance audit, pursuant to Rule 3-79 was conducted by a compliance officer of the Law Society (the " Auditor"). The Auditor reviewed the books and records of the Respondent's practice from October 1, 2006 to February 29, 2008 and determined that the Respondent's books and records were not maintained in compliance with Part 3, Division 7 of the Rules.
6. As a result, the Auditor prepared a preliminary report setting out her findings which included numerous Rule breaches:
 - (a) monthly trust reconciliations were incomplete and not properly prepared;
 - (b) trust reconciliations for the period prior to April 2007 were not produced;
 - (c) in two instances, cash was accepted but no cash receipt book of duplicate receipts was maintained;
 - (d) not all trust transactions were recorded within seven days;
 - (e) no records of general account were maintained;
 - (f) no accounts receivable sub-ledger was maintained as required;
 - (g) there were a number of instances of trust shortages that were not corrected in a timely way;
 - (h) there were two instances of trust shortages in the Respondent's pooled trust account (October 2006 and June 2007) that were not reported as required.
7. After sending the preliminary report to the Respondent, he was advised that a follow-up audit would take place in June 2008. The Auditor returned on June 25 and 26, 2008 and a final report was prepared.
8. A letter from the Manager - Trust Assurance at the Law Society dated June 9, 2008, was sent to the Respondent requesting an explanation for his non-compliance.
9. On July 28, 2008, the Respondent wrote to the Law Society and suggested his non-compliance was

due to the rapid growth of his practice and an inadequate accounting system.

10. On August 7, 2008, the Respondent was asked to deal with each of the individual exemptions as noted, to which he responded by letter dated August 14, 2008.

11. A follow-up compliance audit took place on October 6, 2008 and, although the Auditor determined that there was some progress in achieving compliance, the books and records of the Respondent's practice were not being maintained in substantial compliance with the Rules. Details of the non-compliance are set out in the letter of November 6, 2008. In that letter, the Respondent was advised that he would be subjected to a further compliance audit in one year's time and that he was required to provide monthly status reports as to his progress in bringing his records up to date and to submit monthly reconciliations as well as bank accounts. The Respondent has provided the monthly summaries and trust reconciliations for the period requested.

12. By letter dated December 16, 2008 from the Law Society to the Respondent, he was asked to explain why his 2008 Trust Report contained untrue answers.

13. The Respondent, by letter of January 10, 2009, confirmed his Trust Report contained " inaccuracies" and explained that he was trying to correct the deficiencies and had discussed that with the Auditor during her visits in April and June and he hoped that he would have had compliance by June 28, 2008. He " recognized that this was inappropriate action and that he had no intention to mislead the Law Society."

14. On May 12, 2009, Law Society staff wrote to the Respondent seeking an explanation for his untrue answers in his 2007 Trust Report.

15. By letter dated June 1, 2009, the Respondent explained that he was having difficulties with his accounting software and it was his intention to bring himself into compliance with the requirements. He stated " I was aware that eventually my practice would be audited like every other firm in the Province and there would be no benefit to myself in not maintaining accurate bookkeeping records."

[7] In response to allegation 1 of the Schedule to citation (as amended), the Respondent admitted that for the period ending March 31, 2008, he represented to the Law Society that his books and records complied with the requirements of the Law Society Rules and that he gave untrue answers to several questions in Section C of the Trust Report.

[8] In response to allegation 2 of the Schedule to citation (as amended), the Respondent admitted that, for the period ending March 31, 2007, he represented to the Law Society that his books and records complied with the Law Society Rules and that he gave untrue answers to several questions in Section B and C.

Issue

[9] Pursuant to Rule 4-22, the Panel needs to determine whether to accept the Respondent's admission of a discipline violation and the proposed disciplinary action.

Discussion

[10] Both counsel for the Law Society and the Respondent submit that the Panel should accept the admission that the Respondent's conduct in respect of each of the allegations set out in the Schedule to citation (as amended) constitutes professional misconduct.

[11] The test for professional misconduct is well established in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], which states:

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.

[12] The test set out in *Martin* was recently discussed in *Re: Lawyer 10*, 2010 LSBC 02, where the Review Panel further articulated the tests at paragraph [31]:

The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the conduct in question was a marked departure from the norm and that the member was culpable. ...

[13] In this instance, the Respondent certified that the information in the 2007 and 2008 Trust Reports was true and accurate when he knew that the answers to several questions were not true. The inaccurate answers are set out in the ASOF. Counsel for the Law Society submits that the conduct is a marked departure from the conduct expected by members and the evidence shows that the Respondent was "culpable", as he had prepared the reports personally. We agree with this position.

[14] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the factors relating to penalty were established.

[15] In this case, the conduct is serious as it involves "truthfulness".

[16] The Review Panel in *Law Society of BC v. Geronazzo*, 2006 LSBC 50, commented that "being truthful is a basic requirement when considering whether a person is suitable to practise law" (para. [21]), and that "there are degrees of misleading conduct" (para. [41]).

[17] *Geronazzo* also sets out further factors to be considered in assessing misleading conduct or untruthful representations:

- (a) whether the respondent provides any explanation for the impugned conduct;
- (b) whether that explanation is rational or reasonable;
- (c) whether the representations provided, or were intended to provide, some monetary or other personal benefit to the respondent;
- (d) whether the misconduct is a single act or whether there is a pattern of dishonesty;
- (e) whether evidence was destroyed; and
- (f) whether the deception could be caught and corrected.

[18] Clearly, the Respondent's 2007 and 2008 Trust Reports were misleading; however, we accept the submissions that the dishonesty falls to the lower end of the spectrum for the following reasons:

- (a) When the Respondent completed his 2008 Trust Report, the Law Society's Auditor had been at the Respondent's place of practice in April and in June and brought the deficiencies to the Respondent's attention, and, as such, the Respondent knew, when he completed the Report, that the Law Society was "already fully aware of the deficiencies."
- (b) The Respondent explained that he made a poor choice of action when completing the Trust Report and he anticipated that his records would be put into order soon.

(c) With respect to his 2007 Trust Report, he was aware that his bookkeeping system was inadequate. He installed a new software package in late 2007, and when he completed his 2007 Trust Report, he was attempting to complete the reconciliations as required, which he thought would be done in a reasonably short period of time. Unfortunately, they took longer.

[19] In addition, we considered that:

- (a) his inaccurate answers did not provide him with any monetary benefit;
- (b) the Respondent has no Professional Conduct Record;
- (c) the Respondent admitted his error and was cooperative and is making progress in achieving compliance but is not fully in compliance; and
- (d) the Respondent's conduct falls short of deliberate conduct intending to deceive.

[20] As in all penalty decisions, specific and general deterrence are important factors. The Respondent is well aware of the necessity for accurately completing Law Society forms. He also knows that all members should be aware that the compliance audit program is effective and that non-compliance or misrepresentation will likely be discovered.

[21] In considering the proposed penalty, a number of cases were provided in which fines in the range of \$3,500 to \$7,500 were imposed for breaches of the accounting rules (see *Law Society of BC v. Bonfield*, 2008 LSBC 23, *Law Society of BC v. Wittmann*, 2008 LSBC 24, *Law Society of BC v. Liggett*, 2009 LSBC 21, and *Law Society of BC v. Grieg* 2005 LSBC 20).

Decision

[22] The Panel accepts the admission that the Respondent's conduct amounts to professional misconduct and we also accept the proposed disciplinary action and impose the following:

1. a fine in the amount of \$7,500; and
2. costs in the amount of \$2,000, both the fine and costs payable by October 31, 2010.

[23] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.