2011 LSBC 06
Report issued: February 18, 2011
Citation issued: August 12, 2009

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

Douglas Warren Welder

Respondent

Decision of the Benchers on Review

Review date: December 8, 2010

Benchers: David Renwick, QC, Chair, Haydn Acheson, Rita Andreone, Patricia Bond, David Crossin, QC, David Mossop, QC, Thelma O'Grady, Gregory Petrisor

Counsel for the Law Society: Thomas R. Manson, QC
Appearing on his own behalf: Douglas Welder

Introduction

Overview

[1] This is a simple review. The Respondent was subject to an investigation of his books and records under the Law Society Rules. On four separate occasions the Law Society wrote to the Respondent requesting details about any trust or general accounts in which he carried on the practice of law. The Respondent did not reply to these letters. This is professional misconduct.

Proceedings Below

[2] The original Hearing Panel dealt with a citation issued August 12, 2009 which read as follows:

> You have failed to respond, substantively or at all, to the following requests for information made in the context of the Law Society's investigation of your practice pursuant to Rule 4-43 of the Law Society Rules, as set out and summarized in the Law Society's letters to you dated December 8, 2008; February 11, 2009; April 17, 2009; and June 9, 2009 (the "Letters"):
>
> a. you have not responded to the request that you "provide details of any bank accounts which hold or held trust or general funds for the period covered by the Report, ... explain the basis on which the funds are held and ... also explain any reason ... for continuing to deny the Law Society access for the records for those accounts" (page 7 of the December 8, 2008 Letter);
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> b. you have not provided access to all of your trust and general bank account records;
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> c. you have failed to respond to the questions set out in paragraphs A, B, D, E and J of the

April 17 Letter.

In failing to respond substantively or at all as set out above, you have breached Rule 4-43(2)(b) of the Law Society Rules and/or Chapter 13, Rule 3 of the *Professional Conduct Handbook*.

[3] The Hearing Panel decision is reported at *Law Society of BC v. Welder*, 2010 LSBC 5 (the "Decision").

[4] The Hearing Panel dismissed allegation 1(a) and 1(b) of the citation. The same Hearing Panel decided allegation 1(c) had been made out. The Law Society applied for review of the dismissal of allegation 1(a). In its Letter dated April 9, 2009, the Law Society set out its grounds for review. They are:

a. whether the hearing panel erred in dismissing Allegation 1a on the basis that there were no other bank accounts in existence, when the allegation was that the Respondent *failed to respond, substantively or at all, to the request* to provide details of any other bank accounts; and

b. whether the hearing panel erred in dismissing Allegation 1a on the basis of the answer given by the Respondent in evidence at the hearing, when the misconduct alleged in allegation 1a was a failure to respond to letters from the Law Society dated December 8, 2008, April 17, 2009 and June 9, 2009.

Facts

[5] To understand the matters in this Review, it is necessary to go back to the initiating events that led to the investigation.

[6] On or about May 1, 2007 the Law Society commenced an investigation into the conduct of the Respondent (the "Investigation"). This was prompted by a complaint made by another lawyer. On May 3, 2007 a Class Proceeding, alleging fraud, breach of trust and breach of fiduciary duty was commenced against the Respondent and another lawyer. The same day an Order was made pursuant to Rule 4-43 of the Law Society Rules. The Order directed an investigation be made of the books, records and accounts of the Respondent.

[7] The evidence shows that the Law Society had a reasonable basis to seek confirmation of all trust and general accounts to which the Respondent was signatory during the period of investigation from April 1, 2004 to November 30, 2007:

(a) The Respondent failed to disclose any information about his general account in his 2006 Trust Report.

(b) Karen Keating, a forensic accountant at the Law Society attempted to obtain his authorization to each of the financial institutions to permit the Law Society to access bank records in any relevant accounts held by the Respondent, which was consistent with the Law Society's usual procedure on a Rule 4-43 investigation. However, the Respondent declined to provide this authorization, and drafted his own authorization letter that limited the scope of the authorization to only two trust accounts at one financial institution and only provided the authorization for a period of two months. Authorizations were ultimately obtained on a limited basis, which Ms. Keating accepted in order to proceed with the investigation.

(c) Although the Respondent wrote to the financial institution to request a list of all accounts related to his practice, Ms. Keating was told by a representative of the financial institution that, in a search of bank records by name, only open accounts could be accessed and retrieved. Information about any

closed accounts could only be searched by the account number. Accordingly, the Law Society had not determined whether the Respondent operated any accounts related to his practice at the financial institution that were closed prior to the date of the search on or about May 17, 2007.

(d) The Respondent told Ms. Keating that there were other business and personal accounts at the financial institution to which he was a signatory, and in particular that he held funds in trust for his deceased father's estate, his children and his nephew.

(e) Law Society forensic accountant, Andrea Chan, prepared an interim audit report, which contained a scope limitation arising from the fact that the investigation was limited to three specific accounts. She believed that she could not confirm that she had examined all of the relevant bank and accounting records, and that if any such documentation were produced, it would enable her to either confirm that she had examined all relevant documentation, or may result in further inquiry and investigation.

[8] In all the circumstances, there was a reasonable basis for the Law Society to ensure that it had access to all relevant bank records in its investigation. While Law Society staff did not uncover documented evidence of other bank accounts, the Hearing Panel certainly accepted that there was reason to believe that the Respondent had operated "other bank accounts", either trust or general, through which he conducted the business of his firm. See the Decision at paragraph [16].

[9] Law Society staff lawyer Howie Caldwell asked the Respondent (directly or through his counsel) to provide in writing a list of each bank account which held trust or general funds for the period from April 1, 2004 to November 30, 2007. Each of these requests is set out below, along with the Respondent's response (in italics).

(a) By letter dated April 29, 2008, Mr. Caldwell referred to the scope limitation resulting from the Respondent's refusal to permit the Law Society to access all of his trust account records and asked the Respondent to either confirm he would permit access to all his records in order to permit a complete audit to be conducted or, alternatively, set forth his position on refusing access.

(b) By letter dated July 26, 2008, the Respondent replied:

> As to the comments on the scope of the investigation, Ms. Keating would write out the lists of all the files that she wanted copies of various reports and would give them to my secretary or to me. I understand that she received all of the copies that she wanted. As to my other bank accounts, I am not prepared to grant you access to them.

(c) By letter dated December 8, 2008, Mr. Caldwell wrote to the Respondent's counsel stating:

> In my letter, I also asked for [sic] that Mr. Welder provide the Law Society with access to all his trust and general account records so that Ms. Chan could complete the investigation in accordance with the Order granted under Rule 4-43 of the Law Society Rules. Mr. Welder has not permitted the Law Society to have access to certain bank accounts.
>
> In order to avoid any ongoing confusion about which trust or general account records may be required by the Law Society, I ask that Mr. Welder provide details of any bank accounts which hold or held trust or general funds for the period covered by the Report, that he explain the basis on which the funds are held and that he also explain any reason he may have for continuing to deny the Law Society access to the records for those accounts.

(d) By letter dated February 22, 2009, the Respondent replied:

> I will be discussing your request for access to my other accounts, with Mr. Perry and will advise you once I have his advice.

(e) By letter dated April 17, 2009, Mr. Caldwell wrote that he had received no response from either the Respondent or his counsel, Mr. Perry, on the matter of the bank account information and that:

> ... I would like to give you a final opportunity to provide me with your position on granting the Law Society access to ... the bank account information.

(f) The Respondent did not reply to this April 17 letter, either directly or through counsel.

(g) On June 9, 2009, Mr. Caldwell again wrote to the Respondent, noting that he had "previously sought [the Respondent's] cooperation in providing the Law Society with information regarding other bank accounts that may have held trust funds or general funds". Mr. Caldwell explained:

> Over the past few months you explained that you were seeking the advice of Mr. Perry on this issue and that you would get back to me. However, I have heard nothing from either you or Mr. Perry regarding your position on access to the bank account information.
>
> I am making a final request that you provide the Law Society with details of any accounts that held trust funds or general funds for the period from August 1, 2004 through to and including November 1, 2007, and that you provide the Law Society with all banking records that we may require regarding these accounts. I ask that you comply with this request by 5:00 p.m. on June 17, 2009. If you take the position that you have provided details of all accounts that held trust funds or general funds for the relevant period, then please respond by the specified time and date by setting forth your position on this issue.

(h) As of February 26, 2010 the Respondent had not replied to the letters of December 8, 2008, April 17, 2009 or June 9, 2009 in regards to the matters pertaining to paragraph 1(a) of the citation.

[10] Prior to giving evidence on March 4, 2010 the Respondent had not provided any substantive response to Mr. Caldwell's letter of December 8, 2008. Thus, for the first time, at the hearing, the Respondent testified that during the relevant period he operated a total of three bank accounts relating to his practice. Those accounts were the two trust accounts that the Respondent had reported in his Form 47 as well as the general account that he had informed the Law Society's investigators about at the beginning of the Investigation.

[11] Despite the clear wording of Mr. Caldwell's December 8, 2008 letter, and later letters, the Respondent did not provide the answer he ultimately gave in evidence at the hearing.

[12] Finally, the Hearing Panel noted that the Respondent failed to appreciate his obligation to cooperate with the Law Society's investigation. The Panel also found that the Respondent was playing a cat and mouse game with the investigators. See the Decision at par. [40].

Position of the Parties

[13] The Law Society launched its Review on April 9, 2010. That letter states the issues to be considered. They are:

> (a) Whether the hearing panel erred in dismissing Allegation 1a on the basis that there were no other bank accounts in existence, when the allegation was that the Respondent *failed to respond, substantively or at all*, to the request to provide details of any other bank accounts; and
>
> (b) Whether the hearing panel erred in dismissing Allegation 1a on the basis of the answer given by the Respondent in evidence at the hearing, when the misconduct alleged in Allegation 1a was a failure to respond to letters from the Law Society dated December 8, 2008, April 17, 2009 and June 9, 2009.

[14] During the hearing, the Law Society conceded that its issues on Review could be summed up as follows:

> The Hearing Panel asked itself the wrong question.

[15] The position of the Respondent was two-fold. First, the Law Society was seeking access to his private bank accounts. There is no merit to this argument. Throughout this investigation and audit the Law Society has only been interested in the banking records that pertain to the Respondent's practice of law. The second argument of the Respondent is that he told the Law Society about his three bank accounts, one general account, and two trust accounts. There was nothing further he could tell him. This argument ignores his responsibility to respond to the letters of the Law Society, either in writing or verbally.

Audits and Investigations

[16] The audit of a lawyer's books is not purely a number crunching exercise. Human relations play a significant role. On the one hand is the lawyer. He or she may easily look upon the audit and the investigation as a violation of privacy. If the lawyer has done nothing wrong, he or she may feel that they are being unfairly picked upon. There may also be a fear that the Law Society may get the lawyer on some small technical point. These concerns are heightened if the lawyer is a single practitioner used to running his or her own shop. Of course, if the lawyer has done something seriously wrong, the lawyer may try to hide, obstruct, or frustrate the audit and investigation.

[17] The staff of the Law Society doing an audit or an investigation never know, at the beginning of the investigation or audit, whether the lawyer has nothing to hide or a lot to hide; whether the apprehension of a lawyer is based on a normal concern about privacy; or whether the apprehension is a sign of a serious violation of the *Professional Conduct Handbook*. The staff or representatives of the Law Society doing an audit or investigation take on one of the most challenging activities of the Law Society.

[18] The Review Panel notes that, throughout this audit and investigation, the staff of the Law Society displayed a high degree of professionalism and restraint. In addition, their oral and written evidence in front of the Hearing Panel was complete, concise and accurate.

Analysis

[19] In the opinion of the Review Panel, the Hearing Panel asked itself the wrong question or embarked upon the wrong inquiry. The Respondent is not cited for failure to provide information about his trust and general accounts. He is cited in essence for not responding to the relevant letters. A Law Society investigation or audit may take many forms. One investigation or audit may take a different path than

another. In this case, the staff of the Law Society did an on-site visit. The staff asked questions. Secondly, after the on-site visit, they wrote letters for clarifications. One of the issues was the information on the bank accounts that the Respondent carried on in his practice of law. The letters make it clear that the Law Society wanted clarification on this matter. The Respondent could easily have written a simple letter clarifying this point. He never did.

[20] The crucial point of the Hearing Panel's decision is set out in paragraph [47] of the Decision. It states as follows:

> However, given the Respondent's sworn testimony at the hearing, that he had no accounts other than the three accounts he had reported to the Law Society staff, we cannot find that the Respondent failed to "provide details of any bank accounts which hold or held trust or general funds". If no other bank accounts existed, there is no evidence that he failed to provide details of the other accounts.

[21] The error the Hearing Panel made is it asked itself the wrong question or embarked upon the wrong inquiry. The Respondent was cited for not responding to a number of letters. The Respondent was not cited for failure to provide details about non-existent bank accounts.

[22] The simple answer to the proper question or inquiry is that the Respondent did not respond to the letters.

[23] The leading authority for failing to conduct the proper inquiry is set out in the case of *C.U.P.E. v. N.B. Liquor Corporation,* [1979] 2 SCR 227. At page 237, Dickson, J. (as he then was) says as follows:

> It is contended, however, that the interpretation placed upon s. 102(3)(a) was so patently unreasonable that the Board, although possessing "jurisdiction in the narrow sense of authority to enter upon an inquiry", in the course of that inquiry did "something which takes the exercise of its powers outside the protection of the privative or preclusive clause". In the *Nipawin* case [*Service Employees International Union v. Nipawin Union Hospital*, [1975] 1 SCR 382], in a unanimous judgment of this Court, it was held that examples of such error would include, at p. 389 SCR:
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> > ...acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.
>
> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

[24] Similarly, in this case, the Hearing Panel asked itself the wrong question or embarked on the wrong inquiry. It embarked upon the wrong inquiry in regards to the citation, specifically allegation 1(a). Allegation 1(a) of the citation essentially cites the Respondent for not responding to a number of letters sent to him by the Law Society. The Respondent is not cited for failing to "provide details of any bank accounts which hold trust or general funds, if no other bank accounts existed, there is no evidence that he failed to provide details of the other accounts" as the Hearing Panel found, in paragraph [47] of its decision. The question or inquiry is: Did the Respondent fail to answer the questions in the letters referred to in paragraph 1(a) of the

citation?

Importance of Responding

[25] The *Professional Conduct Handbook*, Chapter 13, Rule 3 places an obligation on lawyers to reply promptly to any communication from the Law Society.

[26] As the *Handbook* is a guide, not every breach will necessarily amount to professional misconduct. However, with respect to a failure to respond to the Law Society, the Benchers found in *Law Society of BC v. Dobbin,* [1999] LSBC 27, that:

> ...it is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct.

[27] The principle in *Dobbin* has been followed since, including in *Law Society of BC v. Cunningham*, 2007 LSBC 17 and *Law Society of BC v. Tak*, 2009 LSBC 25. Indeed, in dealing with allegation 1(c) in this matter, the Hearing Panel acknowledged that at paragraph [57] of the Decision:

> There is ample authority for the proposition that a failure to respond to communications from the Law Society constitutes professional misconduct.

[28] In *Dobbin*, the majority of the Benchers on Review held at paras. 20-25:

> ... If the Law Society cannot count on *prompt, candid, and complete replies* by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.
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> ...
>
> ...There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute.
>
> [emphasis added]

[29] The Benchers on the *Dobbin* Review further held at paragraph 28 that, for a professional, one letter and one reminder from the Law Society should be sufficient in the absence of some explanation. If further time is required to respond, the onus must be on the lawyer to write explaining what time is needed and the reason for which it is needed; *Law Society of BC v. Marcotte*, 2010 LSBC 18, at para [46].

[30] It is noteworthy that, in the Respondent's submission to the Hearing Panel, he admitted, in part, his error. During his submissions, the Respondent stated as follows:

> Now, with respect to the bank accounts, I submit that the evidence, if it wasn't crystal clear, it should have been clarified today. And if I could be faulted, then I should have put it in writing, but I

> thought I was really clear with the accounts I have. I have a general account at [a bank] in that time period. I have two trust accounts at [another financial institution] during that time period. ...

[31] During an investigation or audit, a lawyer may be asked oral questions by the staff of the Law Society, and the lawyer may respond orally. The staff may later ask the same or similar questions for clarification or simply to have a written record of the lawyer's answer. The lawyer may feel the questions are repetitive or unnecessary as he has already answered them. However, the lawyer must respond. He simply cannot ignore the questions as the Respondent did. It is no defence that the Respondent answered the questions in the letter at the hearing below. It was too late.

[32] The Respondent did not respond to the written questions put to him by the Law Society. The Respondent could have easily cleared up any confusion in the minds of the investigators. He did not. This is professional misconduct. Of equal importance, if the Respondent had answered the written questions put to him in the letters, Mr. Caldwell's evidence was that he would have closed down that part of the inquiry. This would have simplified the investigation and saved everyone time and money.

Orders Made

[33] The Review Panel makes the following orders:

(a) We set aside the dismissal of allegation 1(a) in the citation issued August 12, 2009;

(b) We substitute a determination that allegation 1(a) is proven and is professional misconduct;

(c) We remit the matter back to the Hearing Panel to consider submissions on the appropriate disciplinary action and make a decision pursuant to section 38(5) of the *Legal Profession Act* (in respect of this allegation and also allegation 1(c)); and

(d) Either party may, within 30 days of this decision, make written submissions on costs. The other party may respond in writing within 14 days of those submissions.