2011 LSBC 11
Report issued: March 16, 2011
Citation issued: August 4, 2010

AS THE CITATION WAS DISMISSED THE PUBLICATION DOES NOT NAME THE RESPONDENT, PURSUANT TO
RULE 4-38.1(2)

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

Re: Lawyer 12

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing dates: September 24, 2010, December 15, 2010 and January 10, 2011
Panel: E. David Crossin, QC, Single Bencher Panel

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: David Taylor

The Issue

[1] The citation against the Respondent was issued on August 4, 2010. The Respondent has admitted service of the citation.

[2] The citation sets out the following allegation:

> 1. You failed to comply with an order made by a Law Society hearing panel in its written decision issued December 14, 2009 following your penalty hearing held on November 12, 2009; in particular, you did not, by March 31, 2010, provide to the Law Society a written report prepared by a Chartered Accountant or Certified General Accountant stating whether the books and records of your practice were maintained in compliance with Division 7 of Part 3 of the Law Society Rules.

[3] The hearing proceeded pursuant to the jurisdiction established for the summary hearing of a citation as outlined in Rule 4-24.1 of the Law Society Rules. The evidence before the Panel consisted of affidavit and viva voce evidence.

[4] On March 31, 2010, the Respondent provided a written report to the Law Society pursuant to his obligation under the terms of the order. The report consisted of financial statements for the [name] Law Corporation (the Respondent's law practice) prepared by K & Associates, Certified General Accountants, (the "Financial Statements").

[5] The Financial Statements were received on behalf of the Law Society by Ms. Tina Kaminski, a Trust Assurance Auditor employed by the Law Society of British Columbia. The evidence of Ms. Kaminski is that

the Financial Statements submitted by the Respondent did not include any information relating to whether the books and records of the Respondent's law practice were maintained in compliance with the Law Society Rules. It is conceded by the Respondent, and the Panel so finds, that the Respondent failed to submit a report that met the requirements of the Respondent's obligation in accordance with the order.

[6] The obligation of the Respondent was straightforward. On December 14, 2009, a Law Society hearing panel ordered the Respondent to retain and instruct a qualified accountant to prepare a report that addressed the compliance requirements of Division 7 of Part 3 of the Law Society Rules. The report was to be submitted on a semi-annual basis; the first report to be submitted by March 31, 2010 (the "Order").

[7] Although the Respondent retained a qualified accountant, the report that was submitted on March 31, 2010 did not address the requirements of the Rules as ordered. It is apparent on the evidence before the Panel that there was a failure to communicate effectively with the accounting firm concerning the nature of the report that was required.

[8] The issue at the hearing is whether the failure in this regard, in all of the circumstances, amounts to professional misconduct on the part of the Respondent.

Legal Test

[9] "Professional Misconduct" is not a defined term in the Legal Profession Act, the Law Society Rules or Professional Conduct Handbook. It has, of course, been extensively considered.

[10] In *Law Society of BC v. Martin*, 2005 LSBC 16, the hearing panel concluded that the test 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". (*Martin*, para. [171]).

[11] In *Martin*, the panel also made the further observation as follows (see para. [154]):

> … The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[12] In *Re: Lawyer 10*, 2010 LSBC 02, the Benchers on Review articulated the test for professional misconduct as follows (paras. [31] to [33]):

> [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. To put it more precisely, it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.
>
> [32] A respondent must be culpable in order to have committed professional misconduct. The conduct must not only be a marked departure from the norm, but must also be blameworthy.
>
> [33] In order to determine whether the Applicant's conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.

[13] The conclusions in relation to this issue as stated in *Re: Lawyer 10* were the subject of perhaps some skepticism by hearing panels in *Law Society of BC v. McCandless*, 2010 LSBC 03 (at para. [74]) and in *Law Society of BC v. McRoberts*, 2010 LSBC 17 (at para. [29]) wherein both hearing panels characterized the articulation of the test in *Re: Lawyer 10* as susceptible to "circular" reasoning.

[14] In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

The Circumstances

[15] The Order that is the subject matter of this citation arises from a previous citation issued against the Respondent in September 2008 (the "First Citation").

[16] The panel hearing the First Citation found the Respondent to have professionally misconducted himself. The conduct in issue concerning the First Citation can generally be described as a systemic failure on the part of the Respondent to properly maintain the books and records of his law practice in accordance with Division 7 of Part 3 of the Law Society Rules.

[17] The panel hearing the First Citation accepted the joint submission of the parties and imposed the following penalty:

> 2. a condition on the Respondent's practice, pursuant to s. 38(5)(c) of the Legal Profession Act, that he retain a Chartered Accountant or Certified General Accountant who is in good standing to review his books and records every six months for three years and to report in writing to the Law Society whether the books and records of the Respondent's practice are maintained in compliance with Division 7 of Part 3 of the Law Society Rules and, if not, provide a detailed listing of the items of non-compliance, such reports to be provided to the Law Society by:
>
> (a) March 31, 2010;
>
> (b) September 30, 2010;
>
> (c) March 31, 2011;
>
> (d) September 30, 2011;
>
> (e) March 31, 2012; and
>
> (f) September 30, 2012.
>
> The Respondent is responsible for the delivery of these reports to the Law Society and for their cost.

[18] The penalty was clearly directed at instilling in the Respondent a sense of the seriousness with which the Law Society views the obligations of its members and the responsibility the Respondent must demonstrate in fulfilling these obligations.

[19] GP is an accountant. He has, for some years, assisted the Respondent with accounting matters concerning the Respondent's law practice and was familiar with the Respondent's difficulties that had culminated in the finding of professional misconduct in the First Citation. The Respondent had, over the years, placed a great deal of reliance on GP. GP is not a Chartered Accountant, nor a Certified General Accountant.

[20] In anticipation of the hearing panel accepting the joint submission concerning penalty on the First Citation, the Respondent forwarded the terms of the anticipated Order to GP in late October 2009. The Respondent did this prior to the formal issuance of the decision in order to get a head start on complying with the Order.

[21] The Respondent asked GP to assist him in locating an accountant that would be qualified to prepare the report required by the Order. It should be noted that the report has been variously referred to in the documentary and viva voce evidence as a “review”, the “semi-annual review”, the “semi-annual Form 47” or the “Form 47 style audit”. It is clear on the evidence that these various iterations referenced the obligation under the Order.

[22] NK is a Certified General Accountant with K & Associates. The Respondent and GP were familiar with NK as NK had prepared the Respondent’s Form 47 reporting requirements for the previous two years.

[23] GP contacted K & Associates, CGA, and had certain preliminary discussions. GP agreed to provide assistance to NK and provide what material, information and accounting records NK might require from time to time in order to complete the review. It is apparent from the evidence that the Respondent looked to GP to act as surrogate in dealing with NK.

[24] In late November 2009, nk confirmed with the Respondent, via email, that K & Associates were available to do the report but sought clarification from the Respondent as to what was required. On that same date, November 27, 2009, the Respondent responded, via email, to NK. The response took the form of steering the responsibility for clarification back to GP:

> I will copy this email to GP to follow up with you ref actual audit requirements since obviously that gives you the scope of your time requirement etc.

[25] GP gave evidence that he did not follow up with NK concerning the actual audit requirements.

[26] The fact that NK was unclear as to the nature of the report he was to prepare, notwithstanding his preliminary discussions with GP, foreshadowed the failure on the part of all parties to effectively communicate throughout the course of these events. This failure of communication would inevitably prove fatal to the well-intentioned efforts of the Respondent to abide by the Order of the Law Society.

[27] As the issue of retaining and instructing NK was unfolding, another accounting obligation manifested itself. On or about January 11, 2010, the Respondent was advised by the Law Society’s Trust Assurance Department that a Compliance Audit, pursuant to Rule 3-79 of the Law Society Rules, had been scheduled for February 22, 2010.

[28] It is clear on the evidence that during the first half of January 2010 (prior to the additional obligation of the Compliance Audit being introduced into the equation) NK remained unretained and unclear on what he was being asked to do.

[29] NK emailed the Respondent in this timeframe and asked whether the Respondent wanted NK to simply do the usual Form 47 and “a review” or just the Form 47. The Respondent promptly advised NK that he did want NK to perform both these tasks and told NK that he would ask GP to ensure that NK received whatever records he required in order to complete these tasks.

[30] Then, on January 19, 2010, the Respondent’s legal assistant, LP (on the instructions of the Respondent), sent NK an email alerting NK to the latest accounting obligation of the Respondent; that is, the Compliance Audit scheduled for February 22, 2010 and asking NK to organize his schedule accordingly.

[31] Perhaps not surprisingly, NK responded the same day expressing continued confusion about what it was he was being asked to do. The email reads as follows:

> Hi LP. I am a little confused about my role.
>
> I realize that the Form 47 needs to be filed regardless of the compliance audit being done by the law society.

> Does [the Respondent] still need the semi-annual review done? If so, he was going to send me an itinerary showing the dates and deadline for the semi-annual review over a two year period.
>
> Please read below my emails back and forth from [the Respondent].
>
> It might clear what I am trying to say.
>
> Please confirm.

[32] The Respondent testified that, upon reading this email, he realized NK did not have a copy of the Order defining the requirements for the so-called semi-annual review. In other words, NK did not have the critical information that defined what the Law Society was requiring.

[33] The Respondent advised NK via email that his legal assistant "has the letter with the dates for the required semi-annual reviews including the first one due no later than 31 March 2010." The Respondent gave evidence that it was his practice to have direct communication with LP concerning tasks of this sort. The Respondent testified that, while his memory of the precise conversation with LP was somewhat vague, he did have a recollection of asking LP to provide the information to NK and being subsequently told by LP that, in fact, this had been done.

[34] The Respondent has testified that he proceeded thereafter on the assumption that his assistant, LP, had arranged for NK to receive the information required.

[35] On January 20, 2010, the Respondent advised NK that "just the review audit" is to be done and, once again, asked NK to clarify matters with GP.

[36] Also on January 20, 2010, NK sent an email to both the Respondent and GP stating:

> In that case I shall not concern myself with a form 47 report.
>
> We are only going to be performing a semi-annual review engagement.
>
> Please correct me if that is not the case.
>
> In any event, we would like to start as early as possible for the semi-annual review (due March 31, 2010). First week of Feb would be ideal.

[37] On February 22, 2010, the trust assurance auditor, Ms. Kaminski, commenced the Compliance Audit of the books and records of the practice of the Respondent. Ms. Kaminski attended at GP's office in Burnaby for five days as the Respondent's books and records were located there at that time. There is no evidence the Compliance Audit was not completed in a satisfactory way.

[38] The evidence indicates that, after January 20, 2010, NK proceeded to seek information for the purpose of preparing, at least what he apparently considered to be, the required semi-annual review. After this date, there is no evidence to indicate there was uncertainty or lack of clarity in the mind of NK as to what was required by the Law Society.

[39] The evidence is that, throughout this timeframe, up to approximately mid-March 2010, the Respondent's staff, with the assistance of GP, was providing information as requested by K & Associates concerning the preparation of the accounting tasks.

[40] Around mid-March, however, the Respondent voiced a concern to GP that the information being requested by K & Associates appeared more consistent with a "CCRA audit" rather than any "Law Society issues".

[41] On March 22, 2010, GP sent a lengthy response to the Respondent describing the requirements of an accounting review in accordance with GAAP (General Accepted Accounting Principles). The clear inference from this advice to the Respondent was that GP was satisfied that what K & Associates were doing was what the Law Society required. The Respondent testified he took the response of GP as a clear signal that what NK was doing was correct and in accordance with the Law Society requirements.

[42] GP gave evidence that he simply assumed that what was required by the Order was a "normal CGA review" and, consequently, sent his response of March 22, 2010 to the Respondent.

[43] The report that K & Associates submitted to the Law Society on March 31, 2010 was an accounting review as defined by the Canadian General Accepted Accounting Principles ("GAAP"). It was a review obviously performed by evaluating the books and records of the Respondent's law practice in accordance with GAAP. It did not address the requirements of Division 7 of Part 3 of the Law Society Rules.

[44] The only rational conclusion on the evidence is that K & Associates never did receive a copy of the Order, nor advice or instructions as to what was contained in the Order. How NK came to the view concerning the nature of the review required remains somewhat of a mystery. NK did not give evidence. It is conceivable that the erroneous views held by GP as to what the Law Society required were transmitted to NK.

[45] The issue, of course, is not the conduct of GP or NK, but the conduct of the Respondent.

[46] On March 31, 2010, the Respondent attended at the office of NK to pick up the report and submit it to the Law Society. The Respondent's evidence on his attendance upon NK is as follows:

> Q: When you reviewed it, did you believe it addressed the issue of whether or not your books and records were being maintained in compliance with Division 7 and Part 3 of the Law Society Rules?
>
> A: I had doubts. I talked to NK about that.
>
> Q: But you submitted it anyway?
>
> A: It was March 31 there was nothing else could be done. Didn't know for certain of course. He had provided … NK had provided reports satisfactory before, so …

[47] On April 1, 2010, Ms. Kaminski left a voicemail for GP concerning the semi-annual reports. Ms. Kaminski placed a call to GP because she had never been able to reach the Respondent by phone.

[48] GP returned Ms. Kaminski's call that morning. GP indicated to Ms. Kaminski that he was under the assumption that the reviews were to be performed every six months and that the Respondent had hired K & Associates for a review of the financial statements. Ms. Kaminski then told GP that, in fact, the requirement was that the report must address whether the Respondent's law practice was complying with Division 7 of Part 3 of the Law Society Rules.

[49] On the same day, Ms. Kaminski sent an email to the Respondent advising him of what was required by the panel decision and asking him to "please forward us the proper report immediately". That same day, the Respondent replied stating "It looks like I need to ask for an extension."

[50] Finally, on April 1, 2010, GP forwarded a request to Ms. Kaminski seeking a copy of the report requirements. Ms. Kaminski sent GP a copy of the Penalty decision.

[51] On April 2, 2010, the Respondent sent an email to GP indicating that he, the Respondent, was "astounded" that GP did not confirm the meaning and/or scope of the review that was required to K & Associates. He also expressed his disappointment that this had occurred in spite of the Respondent's earlier

expressions of concern to GP about the nature of the tasks being performed by K & Associates.

[52] In early May 2010, the Respondent wrote to the Law Society requesting that the March 31, 2010 review be waived, essentially based on the submission that the funds that he had “wasted” concerning the initial effort of K & Associates had created financial hardship in going forward. The Respondent suggested that the Trust Compliance Audit that had been completed by the Law Society in February essentially ought to give the Law Society the comfort it required. This request was denied.

[53] The report that was required to be prepared and submitted March 31, 2010 was ultimately prepared by K & Associates and submitted to the Law Society in early July, 2010. There is no evidence to suggest that the substance of that report is not in accordance with the Order. The Order of the hearing panel on the First Citation required the next semi-annual report to be submitted to the Law Society by September 10, 2010. The evidence before me is that this report was prepared and submitted on or before that date and, again, there is no evidence that it was other than in accordance with the requirements of the Order.

Conclusion

[54] There is no doubt the Respondent appreciated the seriousness and importance of the Order. He began the process of complying with the Order prior to the penalty hearing that ultimately imposed the obligations contained in the Order.

[55] The Respondent testified he was “very sensitive” to this being done properly and perfectly by March 31, 2010. I accept this evidence.

[56] GP gave evidence on this issue. GP testified he had a number of discussions with the Respondent throughout the relevant period of time. He confirmed that the Respondent was anxious to meet the deadline and to comply properly with the Order of the Law Society.

[57] There is no evidence to suggest that the Respondent proceeded with a dishonest intent or oblique motive.

[58] Counsel on behalf of the Law Society fairly and succinctly summarized the position of the Law Society as follows: “… his conduct is a marked departure from the conduct expected by the Law Society of its member. It demonstrates gross culpable neglect of his duties as a lawyer, in that the Respondent did not take reasonable steps to obtain the report and ensure that report met the terms of the Order, and then he submitted the report to the Law Society when he had no genuine belief that it satisfied the requirements of the Order.”

[59] In my view, in the particular circumstances of this case, it was not unreasonable for the Respondent to initially place reliance on GP and fairly assume GP would forward the critical information or document to NK during the initial discussions that took place between GP and NK. Indeed, it appears on the evidence that the only document the Respondent sent to GP at this early stage was a copy of the letter outlining the precise terms of the Order.

[60] There was a historical context concerning the trust and reliance the Respondent reposed in GP. GP was aware of the issue and obligation facing the Respondent. Indeed, GP had assisted the Respondent concerning the very issues that plagued the Respondent in relation to the First Citation.

[61] The dynamic of reliance shifted, however, in or around mid-January 2010. As previously outlined, on or about January 19, 2010, the Respondent, as a result of an inquiry made by NK, realized NK must not have a copy of the Order.

[62] There is evidence of a historical context to the relationship between the Respondent and NK as well. NK, and NK's staff, had interacted with the Respondent and the Respondent's staff in the past concerning the preparation of Form 47 obligations. There is evidence that there was communication between staff of the respective offices concerning the seeking and giving of accounting information that was required from time to time.

[63] It is in this context that the Respondent immediately advised NK that his legal assistant, LP, had the letter that addressed the requirements for the semi-annual review.

[64] The Respondent testified that he asked his legal assistant, LP, to arrange for NK to obtain a copy of the terms of the Order. He has a recollection of LP confirming this had taken place.

[65] The way the evidence was given by the Respondent on this point brings into sharp focus the issue of credibility. An important aspect of an assessment of credibility is the demeanor of the witness. I found the Respondent's demeanor to be consistent with a witness who is attempting to be truthful in giving his evidence and was not engaging in a self-interested reconstruction of events. The Respondent was firmly of the view that, as a result of these discussions, he was satisfied his assistant had arranged for the terms of the Order to be given to NK. I accept this was his genuine state of mind.

[66] Subsequent to January 19-20, 2010, there is no evidence that the communications from NK continued to express any uncertainty or lack of clarity as to what he was to do in relation to the Law Society obligations. The external circumstances, without the benefit of hindsight, would tend to reinforce the state of mind of the Respondent.

[67] The information the Respondent was obliged to convey to NK was critical to the proper performance of the accounting obligation. The task of conveying the information, however, was simplistic, if not mundane. In my view, it was not unreasonable for a lawyer to convey information of this sort by instructing his legal assistant to perform the task.

[68] The next relevant event of consequence occurred in or about mid-March 2010. The Respondent testified as follows:

> My - my staff told me that the questions being asked or the records being requested by NK's office didn't seem to be the usual Form 47 requests, so I was concerned, since we only had two weeks left for the deadline, that things were - the correct records were being provided, or reviewed or whatever.

[69] On March 17, 2010, the Respondent sent an email to GP in which he wrote:

> I am concerned that this review is in the form of a CCRA audit - what have these questions have [sic] to do with any Law Society issues ????

[70] There was no evidence led at the hearing as to precisely what this meant. There was no evidence as to whether it was an accurate observation or otherwise and, in any event, what the distinction was between "the usual Form 47 requests" and "a form of CCRA audit".

[71] In any event, the import of the evidence is that it raised a concern in the mind of the Respondent as to the nature of the information being requested by NK.

[72] The Respondent, as was his habit, again looked to GP for an opinion. GP, as has been previously referenced in these reasons, responded assertively and at length as to what was required for this type of review. He further provided comfort to the Respondent by indicating that he was continuing to work with NK and provide information to NK. GP did conclude his response, however, by recommending that the

Respondent apply for an extension because GP suspected that K & Associates would be hard pressed to finish the review. The issue of the extension raised by GP was clearly in the context of the timing of the review, and did not relate to the substance of the review.

[73] The Respondent testified concerning his reaction to this advice:

> That it was happening as it should. GP - was quite emphatic that what was being done was correct.

[74] Subsequent to this exchange, the Respondent spoke to NK and was told that NK did not need an extension.

[75] The Respondent had a reasonable basis to believe NK was working with the benefit of the terms of the Order. In this context, it was not unreasonable for the Respondent to accept the assurances of GP. It was appropriate for the Respondent to contact NK concerning the extension and rely on that advice.

[76] Counsel on behalf of the Law Society points to the circumstances surrounding the submission of the report on March 31, 2010 as culpable.

[77] Those circumstances have been previously referenced in the reasons but, for ease of reference, I will reproduce it:

> On March 31, 2010, the Respondent attended at the office of NK to pick up the report and submit it to the Law Society. The Respondent's evidence on his attendance upon NK is as follows:
>
> Q: When you reviewed it, did you believe it addressed the issue of whether or not your books and records were being maintained in compliance with Division 7 and Part 3 of the Law Society Rules?
>
> A: I had doubts. I talked to NK about that.
>
> Q: But you submitted it anyway?
>
> A: It was March 31 there was nothing else could be done. Didn't know for certain of course. He had provided … NK had provided reports satisfactory before, so …

[78] In my view, it cannot be concluded that this evidence properly could give rise to a finding that the Respondent had "no genuine belief" that the report satisfied the requirements of the Order. In the alternative, even if such a finding could properly be made, in my view, it would be artificial to characterize the forwarding of the report, at that point in time, as culpable conduct.

[79] There is no doubt the Respondent failed to be effectual. It is also apparent he did not make the wisest decisions at every turn. He could, of course, have taken different steps and, in retrospect, should have; but I am not persuaded that, on the whole of the evidence, his conduct, in the particular circumstances, amounts to a marked departure from the conduct expected by the Law Society of its members. Further, I am not persuaded, on the whole of the evidence, that the conduct demonstrated gross culpable neglect of his duties as a lawyer.

[80] The citation is dismissed.