2011 LSBC 35
Report issued: December 12, 2011
Report on Facts and determination issued: March 16, 2011
Citation issued: August 4, 2010

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a s. 47 review concerning

Re: Lawyer 12

Respondent

Decision of the Benchers on Review

Review date: October 6, 2011
Benchers: Majority decision: Gregory Petrisor, Alan Ross, Catherine Sas, QC, Kenneth Walker Concurring decision: Leon Getz, QC
Minority decision: Bruce A. LeRose, QC, Chair, Benjimen Meisner

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: David J. Taylor

MAJORITY DECISION OF GREGORY PETRISOR, ALAN ROSS, CATHERINE SAS, QC AND KENNETH WALKER

INTRODUCTION

[1] The Law Society of British Columbia authorized a citation against the Respondent for alleged professional misconduct in failing to comply with an order (the "2009 Order") of a hearing panel (the "Original Panel"). The 2009 Order required him to provide the Law Society with semi-annual reports prepared by a Chartered Accountant or Certified General Accountant stating whether the books and records of his practice were maintained in compliance with Division 7 of Part 3 of the Law Society Rules. The first of these reports was due on March 31, 2010. The Respondent failed to file it as required.

[2] A single bencher panel (the "Single Bencher Panel") dismissed the citation. See Re: Lawyer 12, 2011 LSBC 11. The Law Society seeks a review of that decision.

THE STANDARD OF REVIEW AND THE QUESTION TO BE DECIDED

[3] It is well established that the applicable standard of review is "correctness". The Benchers on Review have the right to substitute their view for that of the Single Bencher Panel if we find that it was incorrect: *Law Society of BC v. Hordal*, 2004 LSBC 36 (para. 8); *Law Society of BC v. Goldberg*, 2007 LSBC 55 (para 8).

[4] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada explained (at paragraph

[50]) what is involved in a “correctness” review:

> . . . When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

[5] The Law Society does not challenge either the Single Bencher Panel’s exposition of the applicable law or its findings of fact (including those based on credibility). Accordingly, the question before us is limited to this:

> Did the Single Bencher Panel correctly apply the law to the facts when it concluded that the Respondent did not commit professional misconduct?

THE FACTS FOUND BY THE SINGLE BENCHER PANEL

[6] For the purposes of this Review, the relevant facts are:

1. The Original Panel issued the 2009 Order requiring the Respondent to file the accountants’ reports described above.

2. Prior to the date of the 2009 Order, the Respondent, knowing the probable terms of the 2009 Order, contacted his bookkeeper, GP and asked him to take steps to retain a qualified accountant to provide the reports. GP located and recommended NK, a Certified General Accountant.

3. The Respondent then relied on GP to take the necessary steps to ensure that NK was provided with a copy of the 2009 Order and properly informed about its requirements.

4. In fact, GP did not provide NK with a copy of the 2009 Order, though the Respondent believed that GP had done so.

5. GP’s communications with NK left the latter unclear as to what was required of him. This, according to the Single Bencher Panel (at paragraph [26]), “foreshadowed the failure on the part of all parties to effectively communicate ... [which] would inevitably prove fatal to the well-intentioned efforts of the Respondent to abide by the [2009] Order of the Law Society.”

6. On January 11, 2010, the Law Society notified the Respondent of its intention to commence a Compliance Audit – a different process, with a different purpose, from that contemplated by the 2009 Order. Before learning of this, NK continued to be unclear as to what was expected of him in connection with that Order.

7. On January 19, 2010 the Respondent’s legal assistant, acting on the Respondent’s instructions, alerted NK by email to the impending Compliance Audit and asked him to arrange his schedule accordingly. NK emailed a reply the same day saying that he was “a little confused about my role.” Upon seeing this email, the Respondent for the first time realized that NK had not been provided with a copy of the 2009 Order and so “did not have the critical information that defined what the Law Society was requiring.” (Single Bencher Panel, at paragraph [32].) The Respondent then informed NK that his legal assistant had a copy of a letter setting out the requirements of the Order and that, if he had any questions, he should sort them out with GP.

8. The Respondent testified that he had asked his legal assistant to provide a copy of the Order to NK.

9. The Respondent was satisfied that his legal assistant had done as he had instructed, and proceeded thereafter on the assumption that this was the case.

10. The Single Bencher Panel described the task imposed by the Respondent on his legal assistant as "simplistic, if not mundane" (at paragraph [67]) and, in the same paragraph, expressed the view that it was "not unreasonable for a lawyer to convey information of this sort by instructing his legal assistant to perform the task."

11. On March 22, 2010 GP sent the Respondent a lengthy email explaining the requirements for an accounting review in accordance with generally accepted accounting principles. The Respondent assumed that this indicated that NK was doing what was required by the 2009 Order. The Respondent "had a reasonable basis to believe NK was working with the benefit of the terms of the Order" (Single Bencher Panel at paragraph [75]).

12. NK's report, provided to the Law Society on March 31, 2010, was in the form of an accounting review and did not respond to the requirements of the 2009 Order.

13. The correct report stating that the books and records of the Respondent's practice complied with the Law Society's Rules, was filed in early July 2010.

14. The Law Society accepts the conclusions of fact of the Single Bencher Panel.

THE LAW APPLIED BY THE SINGLE BENCHER PANEL

[7] The Single Bencher Panel's exposition of the relevant legal principles, set out in paragraphs [10] to [14] of its reasons is as follows:

> [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]).
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> [11] In *Martin*, the panel also made the further observation as follows (see para. [154]):
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> > … 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.
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> [12] In *Re: Lawyer 10*, 2010 LSBC 02, the Benchers on Review articulated the test for professional misconduct as follows:
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> > [31] The formulation of the marked departure test developed in *Law Society of BC v. Hops*, [1999] LSBC 29, 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.
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> [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.
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> [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.

[8] The Law Society does not challenge any aspect of the Single Bencher Panel's exposition of the applicable law. We agree with the Single Bencher Panel's enunciation of the test as set out above. In that respect, we believe that the statement of the law as set out in Martin articulates the test for "professional misconduct" more accurately than the analysis contained in *Re: Lawyer 10*. We adopt the law as articulated in *Martin* and found at paragraph [171]:

> ... 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.

We disapprove of the analysis in *Re: Lawyer 10* in paragraphs [31] to [33] where the case states that it is not professional misconduct if the "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." We agree the language of *Re: Lawyer 10* has been criticized as "circular" reasoning. We find that the proper approach should be to consider the conduct as a whole. If the conduct arises because of: a) events beyond one's control; or b) an innocent mistake, then the conduct cannot be considered conduct that falls below the norm in a marked way. We believe that the analysis in *Re: Lawyer 10* puts the "cart before the horse". The correct approach is found in the language of *Martin* (*supra*).

[9] We have had the benefit of reviewing the dissent decision of Messrs. LeRose and Meisner. We agree with the analysis set out in paragraphs [44] to [51] below.

[10] The Single Bencher Panel concluded:

> [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.

DISCUSSION

[11] The Law Society says, first, that the Single Bencher Panel's decision, as set out above, was not correct and that the correct finding is that it was not reasonable for the Respondent to rely on GP and his legal assistant in the circumstances. It says that in the circumstances it was not reasonable for the Respondent to rely on a person, GP, who was not qualified to conduct the review required by the 2009 Order, to oversee the work of the person, NK, who was qualified and retained to do so.

[12] We do not agree with the Law Society's characterization of what the Respondent relied on GP to do. In our view, the task entrusted to him was not to "oversee NK's work" but to convey to the latter what the 2009 Order required. This was not a particularly sophisticated or complicated mandate. Indeed, it was no more complicated than or qualitatively different from that assigned to the Respondent's legal assistant, which the

Single Bencher Panel aptly described as “simplistic, if not mundane”. It called for ministerial or administrative skills, not sophisticated accounting knowledge. We do not think that it was unreasonable for the Respondent to rely on GP to display these skills. That GP seems to have understood his task in a somewhat grander sense (and, indeed, in that sense apparently to have misunderstood it) is not, in our view, relevant to the reasonableness of the Respondent’s reliance on him for the purpose.

[13] In our view, therefore, the Single Bencher Panel reached the correct conclusion on this aspect of the matter.

[14] In its written submission, however, the Law Society contended that “failure to comply with an order made by a hearing panel is a serious matter regardless of the nature of the order or obligation imposed by the order” and seemed, at least on one view of the language it used, to take the position that breach of a panel order is, per se, professional misconduct.

[15] The detailed exposition of the Law Society’s contention seems to retreat somewhat from such an absolutist position, however, and to rest on the proposition that, because the 2009 Order imposed an important accounting obligation, non-compliance with which “directly undermines the Law Society’s ability to regulate lawyers’ conduct; ” that the Respondent’s failure to communicate with NK directly as to the scope of his retainer represented, in the circumstances, a marked departure from the standard of conduct that the Law Society expects from its members; and that this was gross culpable neglect of his duties as a lawyer and hence constituted professional misconduct.

[16] In our view, and with the greatest respect to counsel for the Law Society, this latter argument is no more than a restatement, in different words, of its core proposition that it was unreasonable for the Respondent to rely upon GP to perform the task entrusted to him of advising NK what the 2009 Order required. We have already indicated our disagreement with that proposition and our view that the Single Bencher Panel reached the correct conclusion.

[17] Accordingly, we confirm the dismissal of the citation by the Single Bencher Panel.

ORDERS MADE

[18] We were not asked to make any determination on the subject of costs and hence have not done so. If the parties wish to make submissions on this subject they may agree on a reasonably expeditious timetable for doing so. If they are unable to agree, we would consider an application to establish such a timetable.

[19] We would like to express our appreciation to both counsel for their extremely able and helpful submissions.

CONCURRING DECISION OF LEON GETZ, QC

[20] The background to this matter is fully set out in the reasons of the majority of this Panel. I agree with the majority’s conclusion that the Single Bencher Panel was correct in dismissing the citation and with its reasons for reaching that conclusion.

[21] I disagree, however, with the majority (and with the dissenting members of this Panel) about the appropriateness of embarking in this case on any discussion of whether *Re Lawyer 10*, 2010 LSBC 02 was correctly decided.

[22] The Law Society has not challenged any aspect of the Single Bencher Panel’s exposition of the

applicable law – neither its discussion of the decision in *Re Lawyer 10* nor its synthesis of the authorities on the test of professional misconduct. Indeed, it has specifically accepted them for the purposes of this Review. It seems to me, therefore, that whether the Single Bencher Panel got the law right on this subject or advanced an acceptable synthesis of the authorities, are not in the circumstances questions that are properly before us. In my respectful view, it is neither necessary nor appropriate in this case to express any view about these matters, and I specifically decline to do so.

MINORITY DECISION OF BRUCE LEROSE, QC AND BENJIMEN MEISNER

[23] This is a Review pursuant to Section 47 of the *Legal Profession Act* by the Law Society of British Columbia ("LSBC").

[24] A citation was issued to the Respondent on August 4, 2010. The citation sets out the following allegation:

> 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.

[25] At the conclusion of the hearing the Single Bencher Panel concluded at paragraph [79] of the Decision on Facts and Determination that

> [t]here 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.

The citation was dismissed.

[26] The issue for this Review Panel to determine is whether the hearing panel erred in finding that the Respondent's conduct in failing to comply with an order made by a Law Society hearing panel in its written decision issued December 14, 2009 did not constitute professional misconduct.

[27] It is settled law that the standard of review under section 47 is that of correctness. The Benchers must determine whether the decision was correct, and if the Benchers conclude that it was not, they must substitute their own decision for that of the hearing panel.

Law Society of BC v. Hordal, 2004 LSBC 36 at 2 (para. [8])

Law Society of BC v. Goldberg, 2007 LSCB 55 at 1 (para. [8])

[28] The Law Society, which is the Applicant in this Review, takes the position that the hearing panel did not err in its findings of the facts and was correct in its recitation of the law in terms of the test for determining professional misconduct.

[29] The Law Society's position on this Review is simply that, in applying the facts to the stated law, the hearing panel erred in finding that the admitted transgression did not amount to professional misconduct.

[30] We will not review the evidence in detail because both parties to this Review essentially agree on the events that took place prior to the transgression and also agree on the cause of the transgression.

[31] What we will point out, however, are salient facts that we have concluded that the hearing panel, and indeed the majority in this Review, have ignored or, at the very least, have given little or no weight.

[32] To ascertain the gravity of the Respondent's transgression in this matter it is necessary to look at the history that culminated in the Order made by a Law Society hearing panel in its written decision issued December 14, 2009. It should be noted that the Law Society and the Respondent made a joint submission to the hearing panel on the penalty imposed in this Order.

[33] The citation that ultimately culminated in this Order directed the hearing panel to inquire into the Respondent's conduct as follows:

> 1. At various times from 2004 onwards, you failed to maintain your books, accounts and records in accordance with Division 7 of Part 3 of the Law Society Rules and in particular:
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> > (a) from at least February 28, 2005 to November 7, 2008, you permitted more than $300 of your own funds to remain in your pooled trust account, contrary to Rule 3-52(4);
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> > (b) at various times between August 2005 to approximately November 2006, you made payments from trust funds when your trust accounting records were not current, contrary to Rule 3-56(1.2);
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> > (c) in or about 2005, 2006, 2007, and 2008, you did not record transactions in accounting records in chronological order and in an easily traceable form, contrary to Rule 3-59(3);
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> > (d) for various periods from January 2006 onwards, you did not retain all supporting documents for both trust and general accounts, contrary to Rule 3-59(4);
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> > (e) from approximately January 2005 to April 2008, you failed to maintain a book of original entry or data source, contrary to Rule 3-6(1);
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> > (f) at various times in 2005, 2006, 2007, you did not keep file copies of all bills delivered to clients or persons charged, filed in chronological, alphabetical or numerical order, contrary to Rule 3-62;
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> > (g) at various times in 2005, 2006, 2007, you did not record each general transaction promptly, and in any event not more than 30 days after the general transaction, contrary to Rule 3-63;
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> > (h) for each of the months of February, April, July, August, September, October, November and December of 2005 and each of February, March, August and September of 2006, you did not prepare a monthly trust reconciliation within 30 days of the effective date of the reconciliation, contrary to Rule 3-65; and
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> > (i) you did not retain the detailed listings related to each month trust reconciliation, contrary to Rule 3-65,
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> > > (i) in or about 2005 and 2006, and
> > >
> > > (ii) in respect of the monthly trust reconciliation for December, 2007.
>
> 2. You failed to comply, or failed to cause your office staff to comply, with an Order dated July 13, 2006 made by the Chair of the Discipline Committee pursuant to Rule 4-43 of the Law Society

Rules, when you or your office staff failed to produce the following documents demanded by the Law Society auditor:

(a) from approximately June 2007 to at least April 2008, you failed to produce your client file and all the documents related to either or both of the following clients: CM and MC;

(b) from June 2007, to July 2007, you failed to provide your client file and all the file documents related to your client DB; and

(c) from approximately April 29, 2008 to at least May 21, 2008, you failed to produce the March 31, 2008 trust account bank reconciliation, including all supporting documents.

[34] At the commencement of the hearing the parties agreed that paragraph 1(d) be excluded from the citation.

[35] At the end of the hearing, the panel found unanimously that all of the remaining allegations set out in the citation had been established by the evidence and concluded:

[39] The Panel is satisfied that, in considering all of the submissions and factors and in spite of a number of factors playing on the Respondent's practice and personal life; we are concerned specifically about:

1. The length of time taken to rectify the transgressions.

2. The failure to follow through with the two action plans.

3. The notice given to the Respondent of the problems as early as May, 2006.

4. The failure to produce any meaningful compliance during the period of his suspension.

[36] The panel went on to say

[40] The systemic problems with his books, which were apparent when the auditors first arrived in May of 2006, and the above-mentioned concerns leave us no alternative but to come to the conclusion that the Respondent's conduct is a marked departure from that which the Law Society expects of its members and as such is Professional Misconduct.

[37] The Order that followed from this aforementioned unanimous finding of professional misconduct was the hearing panel's attempt to compel strict compliance from the Respondent after an established history of failures to comply with accounting rules that are designed to protect the public and in particular clients' money.

[38] The Single Bencher Panel in this case found, however, at paragraph [75] of the decision that, "The Respondent had a reasonable basis to believe NK [the CGA] was working with the benefit of the Order. In this context, it was not unreasonable for the Respondent to accept the assurances of GP [the Bookkeeper]. ..." (our words in brackets).

[39] With the greatest of respect to the hearing panel, we have concluded that this finding is incorrect. Given the long history of the Respondent's transgressions in complying with the Trust Accounting Rules, the fact that he had already been found to have committed professional misconduct for these transgressions and the fact that he participated in the drafting of the Order he ultimately breached have all led us to conclude that it was not reasonable for the Respondent in these circumstances to rely on others.

[40] We have also concluded that none of the uncontested facts that transpired from the time of the first hearing panel's Order (December 14, 2009) to the time of non-compliance (March 31, 2010) should relieve the Respondent from his duty and obligation to comply strictly with the Order of the hearing panel.

[41] The Respondent's transgression in this case is more than a mere oversight or innocent mistake, but rather a continued pattern of ignoring his responsibilities in this regard.

[42] The test for professional misconduct is clearly enunciated in *Law Society of BC v. Martin*, 2005 LSBC 16, where 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 from its members; if so, it is professional misconduct."(Martin, paragraph [171]). As we have already concluded that the Respondent's transgression in this case is more than a mere oversight or an innocent mistake, we are satisfied that his behaviour can be described as gross culpable neglect of his duties as a lawyer and, therefore, a marked departure from the standards the Law Society expects of its members.

[43] With the greatest of respect to the hearing panel and our colleagues in the majority on the Review Panel, we cannot agree with their determination and therefore, find the Respondent has once again engaged in professional misconduct and should be dealt with accordingly.

[44] There is one further matter concerning the hearing panel decision that warrants some comment. The second heading of the decision of the Single Bencher Panel entitled "Legal Test" contains six paragraphs that outline a rather comprehensive and accurate synopsis on the test to determine professional misconduct and how it has evolved over recent years.

[45] In paragraph [13] of the reasons, the Single Bencher Panel refers to concerns that other hearing panels have had in the past about the effect of *Re: Lawyer 10*, 2010 LSBC 02 on the test for professional misconduct. He then goes on to conclude in paragraph [14] that "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."

[46] The view of the Single Bencher Panel set out in paragraph [14] is simply an elegant restatement of the test for professional misconduct established in the *Martin* (*supra*) case.

[47] In *Re: Lawyer 10* the Benchers split on a 4:3 basis on both the result and on the articulation of the test for professional misconduct. Paragraph [12] of the Single Bencher Panel's decision makes reference to the three critical paragraphs from *Re: Lawyer 10* (paragraphs [31], [32] and [33]) that established a two-step process for determining professional misconduct.

[48] Paragraph [31] of the *Re: Lawyer 10* decision concludes:

> 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) event's beyond one's control; or b) an innocent mistake.
>
> (*emphasis added*)

[49] Where this analysis is wrong is that it ties the concept of "a marked departure from the norm" to examples of transgressions that in and of themselves may not rise to the level or degree of a marked departure. The conclusion in *Lawyer 10* does not recognize that there is a spectrum of culpability or blameworthiness between the standards that the Law Society expects of its members and the degree of fault that will constitute professional misconduct in a citation context.

[50] *Martin* describes the threshold as gross culpable neglect. That is to say that the culpability is of an aggravated character and not a mere failure to exercise ordinary care.

[51] If the conduct of the lawyer falls into the latter category then it is not a marked departure from the norm, and thus the lawyer cannot be found to have committed professional misconduct. If the conduct rises to the

level of the former category, then there must be a finding of professional misconduct and there is no need to look any further.