

DISCIPLINE DIGEST

The Society of Notaries Public of British Columbia

June 2011

Timothy Janzen
Commissioned: December 1990

Hearing Date: May 3, 2011
Panel: Akash Sablok (chair), Susan Davis, Joan Letendre, Linda Manning, Dalminder Virk
For the Society of Notaries Public: Marny Morin
For the Member: No attendance

Background

1. This was a review by the directors pursuant to sections 34 and 35 of the *Notaries Act* of the report of the inquiry to determine whether the member is guilty of any of the conduct described in s. 28(1) as professional misconduct or a breach of a provision of the *Act* or a regulation or rule made under it or of a bylaw of the society, or conduct that in the opinion of the directors is contrary to the best interests of the public or the profession or tends to harm the standing of the notarial profession.
2. The inquiry into this matter was conducted March 10, 2011; at that time the member and the Society provided to the inquiry panel a proposed resolution of the complaint which was recorded as an agreed statement of fact and penalty. The member was not present at the inquiry. The inquiry panel report dated March 15, 2011 was reviewed by the directors.
3. Counsel was present to assist the panel members at the hearing and the directors on review and in writing this report.

The Notice of Inquiry

4. The Notice of Inquiry received by the member alleged as follows:

Regarding the Estate of JMC, you did not respond in a timely manner or at all to the following communications:

- a. Email from the Society of July 19, 2010;*
- b. Email from the Society of August 4, 2010;*
- c. Letter from the Society dated September 17, 2010;*
- d. Email from the Society dated November 16, 2010;*

e. Email from the Society to the Member dated November 25, 2010;

In Breach of Rule 8.02 and contrary to Principle 11-P1 and 11-G.

Member's history

5. The member has been a member since 1990. He has no discipline history.

The Agreed Statement of Fact and Penalty and findings of the Inquiry

6. The inquiry panel report describes the agreement between the member and the Society of Notaries Public. At the inquiry the member admitted the facts that follow, which are accepted by the Board:
7. The Last Will and Testament of JMC appointed Timothy Janzen as Executor.
8. The appointment of the member was a personal appointment and not as a Notary Public.
9. The Testator, JMC, died on or about February 28, 2005.
10. The member in his personal capacity took control of the JMC Estate and applied for and was given Letters Probate.
11. The member, as Executor, probated the JMC Estate and made two partial distributions to the beneficiaries in 2006 and in 2007, retaining approximately \$32,000 for final matters.
12. Problems arose in or about October of 2007. The beneficiaries started complaining to the Society that the member, as Executor, was not responding to their appeals for status reports on the windup of the estate. The beneficiaries complained in October 2007, in May 2009, and starting again in July of 2010. In the first two instances, once the complaints were sent to the member, he took some action on the Estate. Beginning in July 2010, the Society asked the member for reports in the matter and the member did not reply in a timely manner or at all to the following communications from the Society:
 - a. Email from the Society of July 19, 2010;
 - b. Email from the Society of August 4, 2010;
 - c. Letter from the Society to the member on September 17, 2010;
 - d. Email from the Society to the member dated November 16, 2010;
 - e. Email from the Society to the member dated November 25, 2010.

The member responded to the July 19th and August 4th, 2010 communications on August 17, 2010. The member did not respond to the communications in c), d), and e) until after the inquiry was commenced.

13. The member admits that he either failed to respond or to respond in a timely manner to various communications from the Society.
14. The member says that his involvement in the JMC Estate was personal (as Executor) and not as a notary public. He believed that the communications did not require a response because they did not relate to his activities as a notary public. The member has since agreed that when it comes to communications from the Society, a member has a professional duty to respond.
15. The member admits that his failure to respond tends to harm the standing of the notarial profession and is a breach of Rule 8.02, contrary to Principle 11-P1 and 11.

Disputed Issue

16. Although the member was prepared to admit the facts recited above, he did not admit that his conduct constitutes professional misconduct. For the reasons that follow which are excerpted from the inquiry report, the board accepts and adopts the findings of the inquiry that professional misconduct is made out.
17. As we understand the member's position, it is that as his actions on behalf of the estate were not undertaken in the pursuit of his profession, his failure to respond to the Society may fall into the category of breaches that may be willful and wrong, but nevertheless explainable as being the result of an honestly held belief at the time that a response was not mandatory.
18. The *Notaries Act* does not define professional misconduct. In order to assist our investigation into this issue the panel reviewed decisions of the Law Society of British Columbia. As is often the case the Law Society can offer significant assistance in this regard as it has dealt with considerably more discipline cases owing to the larger number of members it has and its issues are often very similar, no doubt as a result of the fact that the standards required of notaries and lawyers are so similar.
19. The Law Society's case *Re Payne* (LSBC 28 December 2010) has the following to say about professional misconduct:

[13] It is well established in the case law that a failure to respond to communications from the Law Society is professional misconduct. The Respondent agrees with this statement.

[14] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Professional Conduct Handbook*, but has been the subject of consideration by hearing panels in several cases, including *Law Society of BC v. Martin*, 2005 LSBC 16. The hearing panel in *Martin* considered the question of what constitutes professional misconduct and 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, supra*, at 15 (para. 171). In *Martin*, the panel also observed at paragraph 154 that:

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.

[15] In the recent review decision of *Re: Lawyer 10*, 2010 LSBC 2, the review panel further articulated the applicable test for professional misconduct established in *Martin* by stating, at paragraphs 31 to 33, that:

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.

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.

20. The panel in *Payne* went on to state:

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

[17] While the *Handbook* is a guide and not every breach will necessarily amount to professional misconduct, with respect to a failure to respond to the Law Society:

... 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.

This principle was set out in *Law Society of BC v. Dobbin*, [1999] LSBC 27 (at para. 25) and has been followed since, including in *Law Society BC v. Cunningham* 2007 LSBC 17 (para. 6) and *Law Society of BC v. Tak* 2009 LSBC 25 (para. 25).

[18] The Respondent concedes that his conduct in this case meets the "unexplained persistent failure to respond" standard established in the *Dobbin* case.

[19] In *Dobbin* (supra), the majority of the Benchers on a review held (at paras. 20 and 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 5 communications from the Law Society, the profession would not be governed but would be in a state of anarchy. ... There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute.

21. The rules, principles and expectations applicable to notaries public in the province are no different in this case than from those lawyers are subject to. We agree with the position taken by the Law Society in *Payne* and other cases and applying that reasoning to this case we are of the view that although the member may have had a belief that the services he was providing were not part of his professional activities, the fact remains that the Society was seeking and deserved a response from him.

22. The board believes that the member ought to have explained his position by way of a prompt response, which would have been responsible under the circumstances and lessened the wasting of resources and embarrassment caused by failing to communicate. The Society has to be able to know what issues may be at stake with its members.

23. The board is particularly of the view that in this case a response ought to have been promptly forthcoming as the member is one of the Society's directors and can therefore

be expected to both know how important cooperation from members is to the running of the Society, and to set an example with his conduct for members to follow.

Finding

The Board found as follows:

- a. Breach of Rule 8.02, contrary to Principle 11-P1 and 11-G of the Society's Principles for Ethical and Professional Conduct;
- b. Professional Misconduct as set out in Section 28(1)(c) of the **Notaries Act**.

Penalty

24. The member did not appear at the hearing. The board considered a joint recommendation on penalty.

25. The board was made aware that the conduct of the member in this matter is not representative of his usual practice style. The member has no discipline history or history of complaints of this nature. The panel reported being told that there are a number of reasons for the delay in the wind-up of the Estate, none of them of course excusing the member's failure to respond to communications from the Society that required a response. The member admits that he fell short in his duty to the Society in that regard, but sincerely believed that his personal activities were not subject to Society regulation.

26. In view of the Agreed Statement of Fact, the absence of harm to any party, the panel's belief that this failure to respond was anomalous behaviour on the member's part arising out of the reasoning he provided to the panel and the member's lack of discipline history, the board has assessed the following penalty in this matter:

- a. The member be reprimanded;
- b. The member pay a fine of \$1,000;
- c. The member will attend an educational course on executorship when it is offered later in 2011.

The Member was further assessed the costs of the final hearing.