

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: A charge against **RANDY RUBIN MALINSKY, CA**, a member of the Institute, under **Rule 201.1** of the Rules of Professional Conduct, as amended.

TO: Mr. Randy R. Malinsky, CA

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision and Order made August 23, 2011)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on August 23, 2011 to hear a charge of professional misconduct brought by the Professional Conduct Committee (PCC) against Randy Rubin Malinsky, a member of the Institute.

2. Ms. Alix Hersak appeared on behalf of the PCC. Mr. Frank Bowman represented Mr. Malinsky, who attended throughout the hearing. Mr. Robert Peck attended the hearing as counsel to the Discipline Committee.

3. The decision of the panel was made known at the conclusion of the hearing on August 23, 2011, and the written Decision and Order sent to the parties on August 24, 2011. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, contain the charge, the decision, the order, and the reasons of the panel for its decision and order.

Charges

4. The following charge was laid against Mr. Malinsky by the PCC on March 1, 2011.

1. THAT, the said Randy Malinsky, in or about the period March 1, 2009 through June 1, 2010, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the Rules of Professional Conduct, in that: in responding to a complaint against him, he supported his response by submitting to the PCC a courtesy letter dated March 21, 2008 which had in fact been prepared on or about March 12, 2009, in an attempt to mislead the PCC.

Plea

5. Mr. Malinsky pleaded guilty to the charge.

The proceedings

6. Ms. Hersak made an opening statement and filed an Agreed Statement of Facts (Exhibit 1) and a Document Brief (Exhibit 2). The Agreed Statement of Facts was signed by Mr. Malinsky on his own behalf and by Ms. Hersak on behalf of the PCC.

7. Immediately after the exhibits were filed, the Chair, upon recognizing the facts disclosed in Exhibit 1, stated that he had recently chaired a discipline hearing of another member associated with the subject company. He asked Ms. Hersak and Mr. Bowman if they felt he had a conflict of interest in this matter. Mr. Peck clarified the concern to mean whether they felt there was a "reasonable apprehension of bias" of the Chair in conducting this hearing. Ms. Hersak explained that the facts of this matter are different from the previous hearing and she did not have any concerns of bias. Mr. Bowman also had no concerns of bias by the Chair. The Chair stated that he did not feel influenced by the results of the recent hearing.

8. Ms. Hersak reviewed the Agreed Statement of Facts, making reference to the relevant documents in the Document Brief. Mr. Bowman agreed with Ms. Hersak's submissions and did not add anything further.

9. There were no witnesses called by the PCC or Mr. Malinsky, and neither party submitted any other evidence.

The Agreed Facts

10. The relevant facts as set out in Exhibit 1 are not in dispute. Mr. Malinsky's firm was the auditor of PT, a paving company, for approximately ten years. In 2008 PT, which had been experiencing financial difficulties, asked Mr. Malinsky to become an active shareholder in order to assist in improving the company's profitability.

11. In light of the potential compromise to his independence, Mr. Malinsky approached a CA who had been a partner at a former firm, where PT had been a client, to take on the audit engagement. After discussion with Mr. Malinsky his former partner undertook the audit. Mr. Malinsky then became a shareholder and the CFO of PT.

12. A complaint was made to the PCC alleging that Mr. Malinsky may have breached the independence rules in connection with the 2007 audit of the financial statements of PT. Mr. Malinsky's response to the Associate Director of Standards Enforcement included several documents, including the successor accountant's professional letter to him on March 17, 2008 and his courtesy letter of March 21, 2008. After reviewing the documents, the PCC closed its file.

13. In the course of a subsequent investigation with respect to the successor accountant's audit of PT, new questions about Mr. Malinsky's conduct arose and a second investigation was commenced. Mr. Malinsky confirmed to the investigator that the courtesy letter was written on March 21, 2008, around the time he resigned from the audit. However, when Mr. Malinsky produced an electronic copy of the letter to the investigator, he had to acknowledge that it had actually been prepared on March 12, 2009.

14. At a subsequent meeting with the PCC, Mr. Malinsky acknowledged that he prepared the courtesy letter contemporaneously with his response to the PCC in March 2009, and had backdated the letter for the purpose of supporting his response to the PCC. Mr. Malinsky admitted he had prepared the letter using old letterhead which bore his former office address to make it appear to the PCC that the letter had been written in March 2008.

Decision

15. After deliberating, the panel made the following decision:

THAT, having heard the plea of guilty to the charge, and having seen and considered the evidence, including the agreed statement of facts, filed, the Discipline Committee finds Randy Rubin Malinsky guilty of the charge.

Reasons for the Decision

16. After reviewing the Document Brief and the Agreed Statement of Facts, the panel found the relevant facts to be as set out above in paragraphs 10 to 14. Mr. Malinsky, consciously and deliberately, fabricated a response letter intending to mislead the PCC. He succeeded. When questions arose in a subsequent investigation, he at first repeated the deception and only when confronted with the electronic evidence of the actual date of the letter did he admit the truth.

17. Mr. Malinsky acknowledged, both by his plea of guilty and the explicit admission set out in the Agreed Statement of Facts, that he breached Rule 201.1 of the Rules of Professional Conduct.

18. The panel concluded that this attempt to mislead the PCC, which has the important regulatory responsibility of investigating complaints made against members and firms, constituted professional misconduct.

Sanction

19. Mr. Bowman called Mr. Malinsky to give evidence with respect to sanction. Mr. Malinsky apologized to the panel, stating that he is embarrassed and ashamed of his actions. He was dealing with death and illness within his family at the time of his actions, although Mr. Malinsky was not using this as an excuse. He misunderstood the rules and thought he had to send a letter to the successor CA firm in response to their inquiry of any circumstances they should take into consideration in assuming the engagement.

20. Ms. Hersak, on behalf of the PCC, did not call evidence with respect to sanction and, with the agreement of Mr. Malinsky and Mr. Bowman, submitted a joint submission on sanction. Ms. Hersak submitted that an appropriate sanction would be: a written reprimand, a fine of \$7,500, the requirement to take one professional development course - *Professional Risk Management*, and the usual order regarding publicity. The PCC also sought an order for partial indemnity for costs of the investigation and hearing in the amount of \$7,000.

21. Ms. Hersak submitted that Mr. Malinsky had shown poor judgement by taking steps to mislead the investigator by producing a letter addressed to the successor accounting firm which, in fact, was composed to mislead the Institute. Members of the profession are expected to be honest and forthright and, regardless of the explanation, this type of conduct is unacceptable. Ms. Hersak stated that misleading the PCC damages his and the profession's reputation. Fabricating a document to mislead the investigator was an act of dishonesty. Mr. Malinsky's actions lengthened the process by causing a second investigation to take place.

22. Ms. Hersak also noted a number of mitigating factors. Mr. Malinsky expressed remorse to the investigator and the PCC for his actions, acknowledged his misconduct, pleaded guilty to the charge, had no discipline history, and had signed the Agreed Statement of Facts. There was no personal gain to Mr. Malinsky and no harm was done to the client. The proposed sanctions would satisfy the specific and general deterrence principles of sentencing and protect the public interest.

23. Ms. Hersak distributed a Case Brief containing four ICAO Discipline Committee cases involving failure to maintain the good reputation of the profession: *Orland, Jean-Baptiste, Becker*

and Margel.

24. Ms. Hersak filed a Costs Outline (Exhibit 3) which showed that the costs of the investigation and hearing were just over \$14,000. The PCC was seeking costs on a partial indemnity basis in the amount of \$7,000, about 50% of the actual costs incurred.

25. Mr. Bowman submitted that Mr. Malinsky has expressed remorse and is embarrassed by his actions. He said that Mr. Malinsky misunderstood the rules and thought he had to have a letter, not realizing that his meeting with the successor accountant was adequate. He noted that Mr. Malinsky has no prior disciplinary history, has fully cooperated with the PCC, received no financial gain and did not mislead the public. Mr. Bowman also noted that this matter arose out of dealings between two chartered accountants and no member of the public was involved or affected. Mr. Bowman said that while not trying to minimize the seriousness of what Mr. Malinsky did, the precedent cases all involved third parties. The actions took place during a bad time in Mr. Malinsky's life and the sanctions proposed are appropriate in the circumstances. Mr. Bowman asked the panel to allow Mr. Malinsky a period of 30 days in which to pay the fine and costs.

Order

26. After deliberating, the panel made the following order:

1. THAT Mr. Malinsky be reprimanded in writing by the Chair of the hearing.
2. THAT Mr. Malinsky be and he is hereby fined the sum of \$7,500 to be remitted to the Institute within thirty (30) days from the date this Decision and Order is made.
3. THAT Mr. Malinsky be and he is hereby required to complete, by paying for and attending in its entirety, within one (1) year from the date this Decision and Order is made, the professional development course made available through the Institute *Professional Risk Management – a Practical Perspective* or, in the event the course becomes unavailable, the successor course which takes its place.
4. THAT notice of this Decision and Order, disclosing Mr. Malinsky's name, be given in the form and manner determined by the Discipline Committee:
 - (a) to all members of the Institute
 - (b) to the Public Accountants Council for the Province of Ontario; and
 - (c) to all provincial institutes/Ordre;
 and shall be made available to the public.

IT IS FURTHER ORDERED:

5. THAT Mr. Malinsky be and he is hereby charged costs fixed at \$7,000 to be remitted to the Institute within thirty (30) days from the date this Decision and Order is made.

AND IT IS FURTHER ORDERED:

6. THAT in the event Mr. Malinsky fails to comply with any of the requirements of this Order, he shall be suspended from the rights and privileges of membership in the Institute and his public accounting licence shall be suspended until such time as he does comply, provided that he complies within three (3) months from the date of his

suspension, and in the event he does not comply within the three (3) month period, his membership in the Institute and public accounting licence shall be revoked, and notice of his membership and licence revocation, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Malinsky's practice and/or residence. All costs associated with the publication shall be borne by Mr. Malinsky and shall be in addition to any other costs ordered by the committee.

Reasons for Sanction

27. There was a joint submission on penalty, and the panel had to ensure that the sanction imposed on Mr. Malinsky was appropriate and fell within the range of sanctions imposed in other similar situations.

28. Mr. Malinsky had no previous discipline history. He was remorseful and stated he was ashamed and embarrassed by his misconduct. He stated that he will be cautious in his professional conduct in future undertakings. The panel accepted that his rehabilitation has begun.

29. The panel also noted that upon being shown conflicting documents suggesting an inconsistency in dates, Mr. Malinsky admitted his wrongdoing and fully cooperated with the investigator and PCC. It also noted that Mr. Malinsky cooperated by signing an Agreed Statement of Facts, which saved time. However, it found that Mr. Malinsky's attempt to mislead the Institute not once, but twice, resulted in a longer, and therefore more costly, investigation.

30. The panel accepts that neither the client nor any other member of the public suffered any financial loss, nor did Mr. Malinsky realize any monetary gain from his actions.

31. The panel took into consideration that the lack of integrity shown by Mr. Malinsky cannot be taken lightly. His actions have damaged his reputation and that of the profession.

32. A written reprimand from the Chair reinforces the unacceptable conduct of Mr. Malinsky in this matter and reinforces to Mr. Malinsky that his conduct is not to be tolerated.

33. The panel accepted that a fine of \$7,500 was appropriate, and was within the range of fines imposed in cases with similar misconduct. There were no submissions made regarding Mr. Malinsky's financial situation or his ability to pay the fine. The magnitude of the fine serves as a specific deterrent to reinforce to Mr. Malinsky that misleading the Institute is a very serious matter, and not to be taken lightly. The quantum of fine also reflects the fact that Mr. Malinsky twice attempted to mislead the Institute. The fine serves as a general deterrent to others that such conduct is unacceptable. The panel accepted Mr. Bowman's submission that Mr. Malinsky should be given time to pay the full amount of the fine, and therefore provided for payment in thirty days.

34. The PCC did not request a suspension of Mr. Malinsky's membership in the Institute and the panel concluded that a suspension was not appropriate in the circumstances. As previously stated, Mr. Malinsky had no previous disciplinary history, there was no harm to a member of the public or Mr. Malinsky's client, there was co-operation by Mr. Malinsky during and after the investigation, and he is remorseful.

35. The panel determined that the professional development course *Professional Risk Management – a Practical Perspective*, or its successor course, is appropriate and will assist Mr. Malinsky in becoming sensitive to the issues and risks of conducting a professional practice.

36. The panel concluded that there were no rare and unusual circumstances to justify withholding publication of Mr. Malinsky's name, and no submissions were made to seek such withholding. Accordingly, in keeping with the transparency of the Institute's disclosure of disciplinary matters, and to serve as a general deterrent, publicity of this matter was ordered.

37. Failure to comply with any part of this Order will result in the revocation of Mr. Malinsky's membership in the Institute. Failure to comply signifies that Mr. Malinsky is ungovernable and should not retain the privileges of Institute membership.

38. The panel also concluded that Mr. Malinsky ought to bear some of the costs of this matter. The PCC sought costs in the amount of \$7,000 and Mr. Malinsky agreed with this submission. The panel found that the costs sought, approximately one-half of the Cost Summary submitted by the PCC, was within the range of other awards of costs for similar matters, and that the amount sought was reasonable. The panel allowed Mr. Malinsky thirty days to pay the costs.

DATED AT TORONTO THIS *1ST* DAY OF NOVEMBER, 2011
BY ORDER OF THE DISCIPLINE COMMITTEE



A.D. NICHOLS, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

B.G. ALLENDORF, CA
H.J. TARADAY, CA
S.B. WALKER (PUBLIC REPRESENTATIVE)