

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

HARLEY JEROME GREENBERG

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Date of Hearing: May 25, 2022

Panel: Anita L. Southall (Chair)
Dean Scaletta
Keely Richmond (Public Representative)

Appearances: Ayli Klein, Counsel for the Law Society of Manitoba
Harley Jerome Greenberg, Member Self Represented

REASONS FOR DECISION

1. Harley Jerome Greenberg appeared before a panel of the Discipline Committee of the Benchers of The Law Society of Manitoba on Wednesday, May 25, 2022, pursuant to a Citation dated December 7, 2021. Members of the Panel were Anita Southall, Chair; Dean Scaletta; and Keely Richmond, Public Representative. Ayli Klein appeared as Counsel for The Law Society of Manitoba. Harley Jerome Greenberg was self-represented. The hearing was conducted virtually using online technology. Also in attendance were Law Society staff including Lee-Ann Harrison and Noah Scatliffe. There was no court reporter in attendance, however, the online hearing was recorded in its entirety by Law Society staff.

2. A Statement of Agreed Facts dated May 19, 2022 was filed as Exhibit 1. The Citation is contained at Tab 1 of Exhibit 1. No other exhibits were filed. The Law Society also filed a Book of Authorities.
3. The parties confirmed orally that what was stated in the Statement of Agreed Facts was agreed and accepted by The Law Society and the Member, that they did not object to the appointment of any of the panel members, that Mr. Greenberg is a member of The Law Society of Manitoba and that he is not a member of any other law society. Mr. Greenberg on his own behalf admitted service of the Citation and waived the formal reading of it and admitted to the allegations contained in it.
4. Mr. Greenberg admitted that the agreed facts concerning the charges in the Citation constitute professional misconduct.

Background Facts

5. Mr. Greenberg is 67 years old and has been practising law for 39 years, all in Winnipeg. He graduated from the Faculty of Law at the University of Manitoba and was called to the Bar in 1983. He practises mainly in the area of family law, including retainers under Legal Aid funded matters along with a small amount of estate work.
6. Mr. Greenberg does have a discipline history with The Law Society of Manitoba:
 - In 2000, Mr. Greenberg received a formal caution for trust accounting issues as well as concerns regarding quality of service and conflicts of interest.
 - In April 2006, Mr. Greenberg pled guilty to a charge of failing to respond to the Society, for which he was reprimanded and ordered to pay \$1,000 in costs.
 - In August 2006, the Complaints Investigation Committee ordered a Practice Review of Mr. Greenberg's practice. As a result of the report received, Mr.

Greenberg practiced under supervision from February 15, 2007 to August 15, 2008.

- In May 2009, Mr. Greenberg pled guilty to charges relating to a breach of integrity, conflict of interest and the breach of a trust condition. He received a 30 day suspension and an order to pay costs.
- In October 2012, Mr. Greenberg again pled guilty to a charge of failing to respond to the Society. He received a fine of \$1,000 and was ordered to pay costs in the amount of \$1,000.

7. Mr. Greenberg's last discipline matter was ten years ago.

Facts Relating to the Citation

8. Mr. Greenberg represented Mr. J under a Legal Aid Certificate issued in 2011. Several years into the matter, Mr. J and his former spouse settled issues which included forgiveness of child support arrears.
9. The Director of Social Assistance had a pecuniary interest in a portion of the arrears.
10. In November 2017, Mr. Greenberg filed a motion to vary the child support and to obtain forgiveness of the arrears.
11. Mr. Greenberg's client attempted to reach him eight times from November 2017 to early January 2018. Mr. Greenberg did not reply to any of these attempted inquiries.
12. Mr. Greenberg served the Director of Social Assistance with the motion on January 21, 2018. On January 24, 2018, counsel for the Director sent a settlement proposal to Mr. Greenberg. Under the proposal, Mr. J was required to pay \$1,000.00 of the arrears. Mr. J accepted and began making payments of \$50.00 per month, as would be required under the proposal.

13. Mr. Greenberg confirmed the settlement with the former spouse. Mr. Greenberg was then required to prepare and obtain a consent order to give effect to the terms, upon which all had agreed, so that the settlement offered by the Director would be binding.
14. A further round of failures to respond to his client occurred between Mr. Greenberg and Mr. J in March and April 2018. Again, Mr. J sent six emails asking for a response. Mr. Greenberg did not reply.
15. What followed thereafter was the failure on the part of Mr. Greenberg to finalize the order. From March 2018 to January 2019, Mr. Greenberg circulated a draft order, let the file go dormant, had a brief exchange with counsel for the Director, and then failed to respond to communications by counsel for the Director.
16. Upon notice to Mr. Greenberg by the Director's counsel in January 2019, the Director's counsel then closed their file in February 2019.
17. During the period September 2019 to April 2020, Mr. J followed up numerous times in an attempt to get his matter concluded. Mr. Greenberg either gave assurances that he would look into and deal with it or, at times, simply did not respond.
18. On July 6, 2020, Mr. Greenberg wrote to new counsel for the Director of Social Assistance. By this time, Mr. J had overpaid his arrears which were remitted on the basis that the agreement would be implemented. Counsel advised that the agreement had not been concluded and a refund was not available. Counsel for the Director offered a new approach which was to forgive the unpaid arrears balance still existing as of July 2020.
19. A new round of attempts by Mr. Greenberg and subsequent failures by Mr. Greenberg to complete the order commenced in August 2020. By May 2021, completion of the order still remained pending.

20. Mr. Greenberg never completed this aspect of the matter for his client. At the time of this hearing, Mr. J's overpayment to the Director of Social Assistance arising from Mr. Greenberg's failure to finalize the agreement had yet to be reimbursed to Mr. J.
21. In respect of the second matter identified in The Law Society's Citation, the facts specify that Mr. Greenberg also acted for Ms. C pursuant to a Legal Aid Certificate dated June 25, 2019. On October 29, 2020, the parties had reached agreement as to a number of issues. A Final Order was prepared and endorsed by Ms. C's former partner. Mr. Greenberg advised Ms. C that it would take him a few weeks to sign the Order and have it filed.
22. Delay then occurred with respect to the matter. Ms. C followed up numerous times with Mr. Greenberg from December 2, 2020 to February 18, 2021, when Ms. C notified Mr. Greenberg that she would be filing a complaint with The Law Society.
23. Mr. Greenberg replied on February 19, 2021. He indicated to Ms. C that he would file the Order the following day.
24. Mr. Greenberg did file the Order, but it was rejected twice due to Mr. Greenberg's inability to submit an acceptable form of order. Mr. Greenberg did not inform his client of the second rejection.
25. From late February 2021 to April 30, 2021, Ms. C tried and failed to obtain updates from Mr. Greenberg. The Order was not completed. Ms. C submitted her complaint to The Law Society and subsequently terminated her retainer of Mr. Greenberg.
26. On August 26, 2021, opposing counsel on Ms. C's matter was required to contact Mr. Greenberg, as a Homestead Release prepared in Fall 2020 had been rejected by the Land Titles Office. Mr. Greenberg corrected the deficiency and returned it promptly to the opposing counsel.

Joint Recommendation

27. Mr. Greenberg, being self-represented, and counsel for The Law Society had pre-hearing discussions relating to the matter, culminating in an agreement to make a joint submission in respect of an appropriate disposition.
28. The parties' joint submission requested that the Panel dispose of the matter by making a finding that the conduct of Mr. Greenberg as set out in the Statement of Agreed Facts constitutes professional misconduct as alleged in the Citation and by ordering that Mr. Greenberg be fined \$2,500.00 and that Mr. Greenberg pay \$3,500.00 to The Law Society as a contribution to the costs of the investigation and prosecution of the charges. The joint submission formed part of the Statement of Agreed Facts. It was endorsed by both Mr. Greenberg on his own behalf and by Ms. Klein as counsel for The Law Society.

Quality of Service

29. In The Law Society's *Code of Professional Conduct*, Section 3.2-1 confirms that a lawyer has a duty to provide courteous, thorough, and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil. In the commentary under Section 3.2-1, The Law Society identifies examples of expected practises to meet the quality of service required by members. Some of the key examples under Commentary, Section 5 which are applicable to Mr. Greenberg's Citation include:
 - (a) keeping a client reasonably informed;
 - (b) answering reasonable requests from a client for information;
 - (c) responding to a client's telephone calls;
 - (g) answering within a reasonable time any communication that requires a reply;
 - (h) ensuring that work is done in a timely manner so that its value to the client is maintained;

- (i) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions.
30. Based on the parties' agreement with regard to the Statement of Agreed Facts, as summarized herein, the Panel concludes that Mr. Greenberg failed to provide service that was courteous, thorough and prompt and failed to respond to his clients in both matters under review and that as a result he breached Rule 3.2-1 of the *Code of Professional Conduct* and thereby the charges of professional misconduct have been established.

Principles on Disposition

31. The Law Society filed a fulsome Book of Authorities for the Panel's reference and use.
32. Ms. Klein referenced the decision in *The Law Society of Manitoba v. Nadeau*, 2013 MBLS 4, wherein the discipline panel referenced the purposes of discipline proceedings drawn from the text *Lawyers & Ethics: Professional Responsibility and Discipline*, Gavin MacKenzie ("MacKenzie"), Carswell 2012, Release 3, as follows:

The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty shall be determined by reference to these.

33. The panel in *Nadeau* also properly referenced the legislative purpose of The Law Society as contained within its constating legislation:

These purposes of disciplinary proceedings against a lawyer are fortified by the purpose of the society described in *The Legal Profession Act C.C.S.M. c. L107, section 3*:

3(1) the purpose of the Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.”

34. Ms. Klein reminded the Panel that in the case of a joint submission on penalty, as long the proposed disposition passes the public interest test, the panel is obliged to accept the recommendation (*R. v. Anthony-Cook*, 2016 SCC 43; *The Law Society of Manitoba v. Sullivan*, 2018, MBL 9). MacKenzie emphasizes the need to determine the seriousness of a lawyer’s conduct and highlights a variety of factors which must be assessed in determining an appropriate penalty at page 26-44:

Factors frequently weighed in assessing the seriousness of a lawyer’s misconduct include the extent of injury, the lawyer’s blameworthiness and the penalties that have been imposed previously for similar misconduct. In assessing each of the factors, the discipline hearing panel focuses on the offence rather than the offender and considers a desirability of parity and proportionality in sanctions and the need for deterrence. The panel also considers an array of aggravating and mitigating factors, many of which are relevant to the likelihood of recurrence. These aggravating and mitigating factors include the lawyer’s prior discipline record, the lawyer’s reaction to the discipline process, the restitution (if any) made by the lawyer, the length of time the lawyer has been in practice, the lawyer’s general character and the lawyer’s mental state.

35. A number of decisions issued by discipline panels of The Law Society of Manitoba have also cited mitigating factors found in *The Regulations of Professions in Canada* by James T. Casey. These mitigating factors may be considered in determining an appropriate penalty and are found in the Casey text at pages 14-6 and 14-7:

1. Attitude since the offence was committed. A less severe punishment may be imposed on an individual who genuinely recognizes that his or her conduct was wrong.
2. The age and inexperience of the offender.

3. Whether the misconduct is the individual's first offence it has been suggested that the penalty of revocation should be reserved for repeat offenders and the most serious cases.
 4. Whether the individual has pleaded guilty to the charge of professional misconduct which has been taken as showing the acceptance of responsibility for his or her actions. However, a refusal to admit guilt is not be taken as justifying a higher penalty. Hence a person charged with an offence of professional misconduct is entitled to have the case against him or her proven and to make full answer in defence without fear of the threat of increased penalty.
 5. Whether restitution has been made by the offender.
 6. The good character of the offender.
 7. A long unblemished record of professional service.
36. In *The Law Society of British Columbia v. Ogilvy* [1999] L.S.D.D. #45], [1999] LSBC 17, Discipline Case Digest 99/25, a discipline panel of The Law Society of British Columbia laid down some of the appropriate factors which might be taken into account in disciplinary dispositions, at page 10:
- (a) The nature and gravity of the conduct proven; b) the age and experience of the respondent; c) the previous character of the respondent, including details of prior disciplines; d) the impact upon the victim; e) the advantage gained or to be gained by the respondent; f) the number of times the offending conduct occurred; g) whether the respondent had acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances; h) the possibility of remediating or rehabilitating the respondent; i) the impact on the respondent of criminal or other sanctions or penalties; j) the 2013 MBL 4 (CanLii) 5 impact of the proposed penalty on the respondent); k) the need for specific and general deterrence; l) the need to ensure the public's confidence and the integrity of the profession; and m) the range of penalties imposed in similar cases.

37. The Panel in this matter accepts the stated principles and purposes of the disciplinary process under the jurisdiction of The Law Society of Manitoba and accepts that the factors that have been outlined herein, cited from these well known text references and as applied in numerous Law Society decisions, also have application to the matter herein.

Submissions on Behalf of The Law Society

38. Law Society counsel reviewed mitigating and aggravating factors with respect to Mr. Greenberg's conduct. Among the mitigating factors, Ms. Klein noted that on the spectrum of behaviour leading to a finding of professional misconduct, the failure to provide service and the failure of Mr. Greenberg to respond to the clients and to opposing counsel in the two matters under consideration are on the lower end / less serious end of the spectrum.
39. In addition, Mr. Greenberg gained no personal advantage by his conduct. Further, The Law Society is satisfied that Mr. Greenberg has not made this conduct a habit; based on their investigations, his failure to provide service and failure to respond to clients and counsel found on the two matters here are not a recurring theme across Mr. Greenberg's practice. The Law Society is not seeking practice supervision.
40. Law Society counsel submits that the recommended penalty is financially significant. This proceeding and the public disciplinary process itself will have a reputational effect on this member which goes to the concept of general and specific deterrence.
41. Principles of parity were also raised as to the appropriate penalty and consideration of similar matters that have come before The Law Society. Law Society counsel submitted that the recommended joint penalty in this case was within the range of various other comparable decisions.

42. As to aggravating factors, Law Society counsel noted that both clients suffered prejudice due to Mr. Greenberg's failure to provide adequate and timely service. The Panel confirmed that Mr. J's overpayment of arrears had not yet been resolved, though he appears to have a possible remedy through the Law Society's insurance department and has new counsel who is attending to completion of his matter. Further, Mr. Greenberg has a long history of family law and should have been in a position to provide competent timely service.
43. The key and an important aggravating factor with regard to Mr. Greenberg's misconduct is his significant prior discipline record. Counsel for The Law Society carefully reviewed the prior record and noted that the record is largely unrelated to the quality of service issues arising within the current Citation. As such, the concept of progressive discipline in light of the older unrelated record is not easily applied in the existing circumstances. The Panel notes that Mr. Greenberg's discipline record is dated and that there does not appear to be an obvious pattern as between prior discipline matters and the specific misconduct at issue in the current matters.
44. Having reviewed the nature of the prior discipline record of Mr. Greenberg, counsel for The Law Society acknowledged that, had the conduct been related or shown a continuing pattern of disregard for his obligations, The Law Society would have recommended a suspension in this case.
45. As a final aggravating factor, Ms. Klein noted that Mr. Greenberg's misconduct enforces negative stereotypes about lawyers, including that lawyers are hard to reach, unresponsive, and cannot be counted on to provide proper service.

Submission of Mr. Greenberg

46. Mr. Greenberg was self-represented and therefore addressed the Panel directly at the hearing. Mr. Greenberg unreservedly acknowledged that his conduct as described within the Citation and as adopted and set out in the Statement of Agreed

Facts demonstrates that he fell far short of the qualities that Mr. J, Ms. C, or any members of the public have the right to expect of their lawyer. Mr. Greenberg readily admitted that his misconduct reflects poorly on the profession as a whole. Mr. Greenberg acknowledged that he felt badly about the effect which his failures and delay had on both Mr. J and Ms. C.

47. Mr. Greenberg did briefly note that both with respect to Mr. J and Ms. C's files, he had performed a significant amount of work for each client and had addressed a number of significant issues for each of these clients and that some of the matters were done properly and work was performed in a satisfactory manner.
48. Mr. Greenberg confirmed that both files were subject to Legal Aid Certificates. He acknowledged that in his experience there are pros and cons associated with taking Legal Aid matters and that, candidly, the compensation limitations of the Legal Aid system had some impact on his lack of diligence with regard to his attending to the specific outstanding orders at the heart of both these client matters. Mr. Greenberg, however, acknowledged that this was his issue and that Legal Aid status is no justification for his failure to meet his professional service standard. He readily pointed out that this was not a valid excuse.
49. Mr. Greenberg, having reflected on his conduct, independently chose to drastically reduce the number of Legal Aid cases that he was prepared to receive. In this respect, Mr. Greenberg was honest with himself in his reflection on the situation and was forthcoming with the Panel as to the factors which may have led to his inadequate service and delay, combined with his failure to respond.
50. With regard to lack of communication, Mr. Greenberg acknowledges that he is required to address emails and communications promptly. Again, Mr. Greenberg indicated that he was not providing any excuses and that on the facts agreed to between the parties, his behaviour was totally inadequate. Mr. Greenberg advised the Panel that he has established a plan for himself to ensure that he deals with

matters and diarizes matters for prompt attention so as not to repeat his recent past history of inadequate service.

Decision

51. This Panel is obliged pursuant to *Law Society Rule 5-96(5)* to make and record a resolution stating which if any of the acts or omissions stated in the charge have been proven to the satisfaction of the Panel and further whether or not by the acts omissions so proved the member is guilty of professional misconduct. In this case, upon review of the evidence before it, the Panel is of the view that all of the acts or omissions stated in the citation have been proved and constitute professional misconduct.

52. As to disposition, the Panel recognizes that it is bound by the principles in the *Anthony-Cook* case found in The Law Society's Book of Authorities that oblige a panel to follow a joint recommendation except in the most exceptional circumstances. In this circumstance, the Panel was somewhat troubled by the joint recommendation with regard to a fine, and questioned counsel for The Law Society as to why a suspension was not an appropriate remedy in the circumstances. Counsel for The Law Society outlined, as contained herein, the mitigating and aggravating factors on the facts and, in particular, she spent time addressing the nature of the previous discipline record of Mr. Greenberg and setting out how the previous acts of misconduct were unrelated to the behavior identified in the Citation. The Panel was also convinced that Mr. Greenberg's acknowledgement of his improper behaviour was both candid and genuine. Mr. Greenberg made no excuses for his behaviour, but did share with the panel his introspection with regard to some of the factors that may have led to failures. Mr. Greenberg also submitted that he had reflected on his improper conduct and has taken steps to address the conduct in order to avoid a repeat of these same behaviours. Again, based on his submissions, Mr. Greenberg truly appears to have given thought to this situation such that the Panel is satisfied that a more severe

penalty would likely not add to the specific deterrence with respect to the member. Finally, Mr. Greenberg has admitted guilt and has cooperated with The Law Society with respect to preparation of the Statement of Agreed Facts, a factor which the panel considers to be significant and squarely within the disciplinary principles as set out herein.

53. As a result, the Panel has concluded that the proposed disposition under the joint recommendation is accepted and that the penalty imposed, in light of all of the factors taken into account and on the submissions of the parties, will not bring the profession into disrepute or otherwise be contrary to the public interest.

54. Accordingly, this Panel hereby orders that:

1. Mr. Greenberg pay a fine of \$2,500.00;
2. Mr. Greenberg shall pay \$3,500.00 to The Law Society as a contribution to the costs of the investigation and prosecution of these charges.
3. Mr. Greenberg can make arrangements with the CEO of The Law Society regarding payment of the fine and costs.

Dated this 6th day of September, 2022.



ANITA L. SOUTHALL (Chair)



DEAN SCALETTA



KEELY RICHMOND (PR)