THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

KAREN ANN BURWASH

– and –

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Date of Hearing: July 26, 2022

Panel: Sarah A. Inness (Chair)
Grant Mitchell, Q.C.
Susan Boulter (Public Representative)

Appearances: Ayli Klein, Counsel for the Law Society of Manitoba
Gavin Wood, Counsel for the Member

REASONS FOR DECISION

Introduction

This is a discipline decision for a member who, while bound by an Undertaking to the Law Society of Manitoba to act with diligence, failed to act diligently in an administrative law appeal, resulting in the appeal being closed.

Karen Ann Burwash ("the member") was called to the Manitoba Bar on June 28, 1990. She has not been called to any other Bar. She has no prior disciplinary history.

In a Citation served on the member, The Law Society of Manitoba ("the Society"), alleged she committed two breaches of the Rules of the *Code of Professional Conduct*: first, by failing to provide service that was "competent, timely, conscientious, diligent, efficient, and civil" (3.2-1); and second, for failure to fulfill an Undertaking to the Society (7.2-11).

A virtual hearing took place on July 26, 2022, at which the member pled guilty to both counts in the Citation (Ex. 1). A Statement of Agreed Facts was provided to the panel in advance of the hearing (Ex. 2), along with a Book of Authorities comprising past discipline decisions for similar conduct of varying degrees of seriousness and consequence. All of this was helpful to the panel during the hearing and the decision-making process.

While the parties agreed on the facts, they differed on the appropriate penalty. The Society recommended a $1,500.00 fine and the member recommended a reprimand. Both parties agreed on a costs order of $3,000.00, payable to the Society.

At the conclusion of the hearing, the panel took a recess to discuss the matter. When the hearing re-convened, the panel delivered an oral decision imposing a Reprimand and $3,000.00 costs, as well as an order that the member register and attend all practice management programs offered by the Society. The panel indicated that written reasons would follow. These are the panel's reasons.

Facts

As mentioned above, the facts and circumstances are succinctly set out in Ex. 2 but will be briefly summarized here, including reference to additional information provided at the hearing by agreement of the parties.

In January 2017, the member agreed to represent G.H. ("the client") in an appeal to the Social Services Appeal Board ("the Board") and filed a Notice of Appeal on March 21, 2017. The appeal was from a refusal by the Employment and Income Assistance (EIA) program to provide additional funding for the client's special diet beyond the therapeutic diet funding it had already approved. The member took up the matter on a pro-bono basis as the client had no funds to retain counsel privately and Legal Aid Manitoba tends not to issue certificates for these matters due to its limited funding criteria.

Between April 6, 2017 and August 10, 2017 the Director of the Board ("the Board") attempted to contact the member in writing and by telephone messages to raise a jurisdictional issue and provide an opportunity for a written response. The member never responded. The Board then communicated directly with the client, who advised that the member would be providing a response. This resulted in action. On November 29, 2017, the member submitted a lengthy written argument on the jurisdictional question. On December 6, 2017, the Board wrote the member to ask

that she contact the hearing officer to request an appeal date. On February 2, 2018, the Board left a voicemail for the member, as it hadn't been contacted for a hearing date. On February 18, 2018, the Board wrote the member (copying the client) advising that a written explanation for the delay was required since no response had been received. The letter directed that a date must be arranged prior to March 6, 2018, or the file would be closed. The member acknowledged receipt of the letter and indicated she would respond, but failed to do so. On April 3, 2018, the Board again wrote the member (copying the client) to advise that the appeal was closed.

In the fall of 2019, the client contacted a lawyer at the Public Interest Law Centre (PILC) inquiring if it would help her to retain another benefit that EIA was eliminating, copying the member in this matter. The member in this matter wrote back, copying the client and the PILC lawyer, advising she had acted for the client in the past and would be pleased to help out again if needed. The client questioned the member on her reference to having acted for her "in the past," believing her file was still active. The member said she would look into that, but never updated the client. In the meantime, the client contacted the Board and learned her appeal was closed. She emailed the member on November 25, 2019 to request her file, but received no response.

While the member has no record of discipline convictions, she entered into an Undertaking with the Society on July 5, 2016, which was still in effect during her 2017-2019 representation of the client. The Undertaking required the member to, among other things:

- Provide each of her clients with regular updates regarding the progress of their matters;
- Provide each of her clients with reporting letters upon the conclusion of their matters or her representation of them; and
- Reply promptly to all professional communications requiring a reply received in the course of her practice, including, but not limited to, communications from her clients and other counsel.

Consequences of Professional Misconduct or Conduct Unbecoming

Section 72(1) of *The Legal Profession Act C.C.S.M. c. L107* ("the Act") sets out a number of penalties for findings of misconduct, including the following:

(d) order the lawyer to pay a fine;

(e) order the lawyer to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the lawyer was found guilty;
(f) reprimand the member;
(k) make any other order or take any other action the panel thinks is appropriate in the circumstances.

Purposes and Principles of Disciplinary Proceedings - Protection of the Public

The legal profession is self-regulating. The purposes underlying disciplinary proceedings support the purpose of the Society described in Section 3(1) of the Act: *The purpose of the Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence*.

In *Lawyers & Ethics: Professional Responsibility and Discipline, Gavin MacKenzie ("MacKenzie"), Carswell 2012, Release 3,* the author comments on the purposes of discipline proceedings, at p. 26-1: *"It is recognized that the purpose 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 purposes."* (emphasis added)

These purposes are well accepted as applicable to LSM proceedings: *The Law Society of Manitoba v. Nadeau, 2013 MBLS* 4 (p. 1); *The Law Society of Manitoba v. Sullivan, 2018 MBLS 9* (para. 8).

MacKenzie also emphasized the need to determine the seriousness of a lawyer's conduct and highlights a variety of factors to be assessed, including: the extent of injury, the lawyer's blameworthiness, the penalties previously imposed for similar conduct to achieve proportionality in sanctions and the need for deterrence. The panel must consider aggravating and mitigating factors relevant to the likelihood of recurrence, including 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 practicing, the lawyer's general reputation and mental state (pp. 26-41).

In *The Law Society of Manitoba v. Nadeau, 2013 MBLS 4*, the panel adopted consideration of the following factors listed in the *Law Society of Upper Canada v. Ernest Guiste, 2011 ONLS HP 0129*: "i) The existence or absence of a prior disciplinary

record ii) The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others iii) Whether the lawyer has since complied with his/her obligations by responding to or otherwise cooperating with the Society iv) The extent and duration of the misconduct v) The potential impact of the lawyer's misconduct upon others vi) Whether the lawyer has admitted misconduct and obviated the necessity of proof vii) Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct viii) Whether the misconduct is out-of-character or conversely likely to recur."

The "Ogilvy factors" arising from case of *The Law Society of British Columbia vs. Ogilvy [1999] L.S.D.D. 45; [1999] L.S.B.C. 17, Discipline Case Digest 99/25* have also been accepted in Manitoba: for example, see *R. v. Nadeau*, supra, at p. 4. These factor include: "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 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 in the integrity of the profession; and (m) the range of penalties imposed in similar cases."

The factors listed in the cases above are not intended to be exhaustive. It is important that the panel hearing a disciplinary matter consider all factors and circumstances applicable to the case before it. Furthermore, prior precedents of penalties imposed for similar misconduct is helpful and offers guidance on an appropriate penalty, however, parity cannot override consideration of each individual case on its own facts and circumstances.

Position of the Parties

The Society

The Society emphasizes the seriousness of an Undertaking and its importance as a tool for the Society in its regulation of lawyers. In this case, the Society argues, the Undertaking served to formalize the requirements expected of any lawyer and to

address the conduct in issue. The Society acknowledges that but for the Undertaking, a reprimand for a "quality of service" breach may be appropriate in certain cases. The existence of the Undertaking differentiates this case from those cases and is an aggravating factor.

While recognizing that the seriousness of the misconduct is at the lower end of the spectrum, the Society argues actual harm occasioned by the loss of ability to pursue the appeal is an aggravating factor which somewhat elevates the seriousness of the misconduct. The client was also prejudiced as she was unable to retain new counsel on a pro-bono or legal aid basis.

A further aggravating factor is the length of time the file was "inactive" (two years), during which the client believed the file was active.

The Society acknowledged the existence of multiple mitigating factors, including 32 years of service and lack of prior disciplinary record. The existence of an early guilty plea and the fact that she expressed a desire to accept responsibility immediately was noted. Finally, the fact that the conduct wasn't intentional and didn't serve to benefit the member was relevant. Simply put, this file "fell through the cracks."

In summation, the Society argued that similar prior cases by way of parity support the imposition of a fine, which is necessary to give effect to the principle of general deterrence. The public has a right to expect that their matters are being handled safely and diligently, regardless of whether the file is a private retainer or pro-bono matter. To send this message, the Society recommended a fine of $1,500.00, which is the minimum the Society generally recommends.

Counsel for the Member

Counsel stressed the exemplary background of the member in her contribution to the community over many years. Her volunteerism, through sitting on Boards, founding important organizations such as St. Raphael Wellness Centre, taking on pro-bono work, and contributing to her faith community through Church activities and roles cannot be adequately summarized in a few lines of this decision. The panel notes this contribution cannot be quantified in monetary terms, as its value is reflected in the quality of life of the individuals whom her work has benefitted.

The member's practice consists primarily of family law (70%), with civil litigation (20%) and estate planning and administration (10%) comprising the balance. Her counsel

emphasizes that domestic practice is challenging work and the lack of prior discipline is even more noteworthy when considered in that context.

Counsel acknowledges the Undertaking reflected difficulties in the member's practice and how she struggled to "get things done," but this is not attributable to taking on too many files to generate greater billings. He emphasized the member's motivation for practice is satisfaction from contributing to her community and assisting her clients, not financial wealth. She will often take up cases or causes on a pro-bono basis. In fact, this was not the first pro-bono file she took up on behalf of this client, having previously argued a motion for leave to appeal to the Manitoba Court of Appeal from a decision of the Social Services Appeal Board.

Counsel argued that the member took the Undertaking seriously and made gains in her practice management. The Society is correct that this file "fell through the cracks," but the member has taken positive steps to get back on the rehabilitation track by working with the Society's practice management advisor and attending courses offered by the Society on practice management. Counsel was very transparent, sharing the member's annual income, and arguing that a reprimand is the appropriate penalty. He emphasizes that a reprimand is a formal and public record of discipline; the costs award alone will have a significant financial impact on the member; and that she is committed to self-improvement.

The Member

The member addressed the panel herself and personally apologized during the hearing to her former client, who attended the hearing as an observer. She explained that while the appeal would have been tough to win on both the jurisdictional and substantive points, she wanted to advocate for the client and was committed to the client and the cause. The panel notes the fact the member wrote a lengthy written submission on jurisdiction as further evidence that the member wasn't "dialing it in" on this pro-bono file. The member never hid behind the low chance of success of the appeal as an excuse for her conduct. To the contrary, she expressed insight into the impact of her actions on her client and others and was genuinely remorseful for her misconduct.

The member not only expressed a desire to do better, but she also committed herself to taking practice management courses and adapting her office systems in a genuine effort to ensure she is managing her practice successfully and to prevent the recurrence of this behaviour. She explained how she has implemented a new and

more rigid computer software reminder system, in addition to implementing some new practice management tools learned from some courses she took on her own initiative through the Society. Just prior to the hearing, the member met with her counsel to provide a demonstration of the system, so he would have a full sense of her use and commitment to being effective in her practices.

Decision

The panel recognizes the importance of diligence in practice and the seriousness with which lawyers are required to take their professional responsibilities. The conduct of the member not only fell below acceptable practice standards, but it also amounted to misconduct that perpetuated itself in a failure to act diligently over a lengthy period of time in a multitude of ways, including failing to respond to telephone calls and correspondence; failing to keep the client regularly updated; and failing to respond to the client's request for the file. Her failure to respond was in essence a failure to act.

The member's inaction resulted in the client's appeal being closed without being decided on jurisdiction or the merits. The fact the retainer was pro-bono is irrelevant to the finding of misconduct and the member did not suggest the pro-bono arrangement was a mitigating factor. Albeit the inaction wasn't intentional or wilful, the neglectful and avoidant behaviours made the conduct and ultimate consequences much worse.

Counsel's word is their bond. Undertakings, such as the one entered into by the member in this case, are legally binding promises. Undertakings to the Society are entered into as a mechanism to ensure the public is protected and to ensure that the reputation of the lawyers, and the Society who governs them, is held in the highest esteem.

The misconduct of the member in the present case is rendered more serious by the fact that she also failed to comply with her Undertaking when she breached the *Code of Professional Conduct*. Clients and other professionals are entitled to trust that counsel's promises will be fulfilled, that deadlines with be met, that inquiries or communications will receive a prompt reply and that counsel will regularly update clients as to the progress of their matters, being diligent with respect to the handling of their file. The Society acknowledges that in the absence of the Undertaking, a reprimand might have sufficed to meet the goals of discipline.

The central issue for the panel is to determine the most appropriate penalty to meet the necessary purposes and principles of protection of the public, maintaining high professional standards, and preserving public confidence in the legal profession. Is the imposition of a fine necessary to achieve those purposes and uphold those principles?

The following factors are taken into account by the panel:

- The nature and number of incidents of inaction over a lengthy period of time;
- The fact the appeal was closed due to the member's inaction;
- The fact the member was on an Undertaking at the time of the misconduct on conditions intended to address the conduct at issue;
- Lack of prior disciplinary convictions;
- Lengthy practice history (32 years);
- Dedication to pro-bono work in practice and extensive community contributions;
- Misconduct was neglectful and not wilful or intentional;
- No personal motivation or benefit;
- Early guilty plea;
- Genuine expression of remorse and responsibility;
- Verbal apology to client and recognition of the harm caused;
- Affirmative steps undertaken to address practice management challenges (taking courses and implementing new software and other office tools for managing deadlines and tasks);
- Rehabilitative potential;
- Specific deterrence achieved through the disciplinary process and the public record of misconduct on the member's record; and
- The need for general deterrence is lessened where the misconduct stems from neglect in practice management/quality of service standards as a result of a member struggling in those areas, as opposed to intentional or wilful misconduct.

Parity

The principle of parity is but one factor, among those listed above, in determining an appropriate penalty. The cases provided to the panel were helpful but not surprisingly none were exactly on point with the facts in the present case. The three decisions reviewed below were most instructive.

The decision in *The Law Society of Manitoba v. David W. Walker, 2020 MBLS 2* was acceptance of a joint recommendation for a $1,500.00 fine in the context of four counts of similar misconduct pertaining to four separate client matters over the course of 16 months, including failing to attend court for trial and sentencing matters and failing to respond to the Complaint Resolution Counsel of the Society, all the while being bound by an Undertaking similar to the one binding the member in the present case.

The decision in *The Law Society of Manitoba v. Webb, 2021 MBLS 9* was acceptance of a joint recommendation for a $1,500.00 fine in the context of one act of similar misconduct but the member had far less years of service to the profession. Furthermore, Webb didn't have a history of dedicated community service and pro-bono work like the member. Finally, Webb accepted a formal caution for similar behaviour from the Complaints Investigation Committee shortly before her misconduct.

The decision in *The Law Society of Manitoba v. Richard Alcock, 2021 MBLS 2* was acceptance of a joint recommendation for a reprimand with an order to complete three educational programs. There was a dated prior reprimand on his disciplinary record. Although the harm occasioned to the client by his inaction was largely remedied, he didn't have a history of dedicated community service and pro-bono work. Although he wasn't bound by an Undertaking at the time of the misconduct, he hadn't taken affirmative steps to address practice management issues following his misconduct but prior to the hearing as has the member in the present case.

Despite the principle of parity, no two cases are identical, and each decision must rest on its own facts and circumstances. In recognition of the overarching purposes of discipline penalties, the panel returns to the question posed earlier: Is the imposition of a fine the most appropriate penalty to meet the purpose of protecting the public, maintaining high professional standards, and preserving public confidence in the legal profession? The answer to this question is no.

Despite an able submission on the part of the Society and important points raised for consideration, the panel determined that the purposes of discipline can be achieved by the imposition of a reprimand, costs, and an order to attend all practice management courses offered by the Society on an ongoing basis.

At the heart of the issue before the panel was whether the Society has demonstrated that a reprimand, the first step of progressive discipline for a member who has not

previously been disciplined, is sufficient to achieve the goals of discipline in these circumstances. Despite the aggravating factors noted by Society counsel and as listed above, the panel does not find that they warrant skipping that first step. This is not to say that if the circumstances of charges are sufficiently serious, skipping one or more steps of progressive discipline cannot be warranted. Our finding is that taking into account the mitigating factors as well as the aggravating factors, the case for skipping a step has not been met.

The member would be financially impacted by the imposition of a fine, in addition to costs. A fine isn't necessary to achieve specific deterrence as we are satisfied that has been achieved through the member's participation in the proceedings and the public record of a conviction. Furthermore, if the goal is truly to enhance public protection, the payment of a fine requires no further commitment to practice management efforts beyond a promise to comply with the Undertaking, which is the very promise the Society argues she broke by her misconduct, despite every good intention to follow it.

The panel determined that the best way to protect the public, maintain high professional standards within the profession, and maintain public confidence in the legal profession, is to ensure that ongoing practice management efforts commenced by the member will continue and can be monitored by the Society for compliance. This also achieves the purpose of general deterrence by reminding members of the Society of their ongoing obligations to attend to practice management issues to reduce the chances that their own files will "fall through the cracks." The panel is mindful that excessively punishing the member in the present case could have the unintended consequence of deterring members from taking on pro-bono matters.

Notwithstanding this entry on her discipline record, the member who appeared before us has a reputation for long-standing pro-bono work and volunteerism within the community that should inspire other members of the profession to follow.

Disposition

The panel orders that:

1. Karen Burwash be reprimanded on each of the two allegations contained within the citation to which she entered guilty pleas;

2. Karen Burwash pay $3,000.00 as a contribution to the costs of the investigation and prosecution of the charges by a date provided at the discretion of the Chief Executive Officer of the Society; and

3. Karen Burwash register and attend all practice management programs offered by the Law Society of Manitoba unless and until she is directed otherwise by the Chief Executive Officer of the Society or designate.

The panel wishes to thank counsel for their work in reaching a joint agreement on the facts, submitting the materials to the panel in advance, and the helpful submissions made at the hearing.

Dated this 9th day of August, 2022.

Sarah A. Inness (Chair)

Grant Mitchell, Q.C.

Susan Boulter (PR)