

**THE LAW SOCIETY OF MANITOBA**

IN THE MATTER OF:

**ELLERY GERARD STRELL**

- and -

IN THE MATTER OF:

**THE LEGAL PROFESSION ACT**

Date of Hearing: March 1, 2023

Panel: Irene Hamilton, K.C. (Chair)  
James McLandress, K.C.  
Susan Boulter (Public Representative)

Appearances: Rocky Kravetsky, Counsel for the Law Society of Manitoba  
Keith Ferbers, Counsel for the Member

**REASONS FOR DECISION**

1. Ellery Strell was called to the Bar in Manitoba on June 28, 1979 and has been a practising member of the Law Society of Manitoba (the Society) since then. Mr. Strell has no formal disciplinary history.
2. Mr. Strell entered into an Undertaking with the Society on August 18, 2017 in relation to his billing practices.

**The Citation**

3. Mr. Strell was charged with professional misconduct in a Citation dated September 20, 2021, amended February 23, 2023, containing three charges:
  1. From and after August 18, 2017 you acted contrary to Rules 2.1-1 and 7.2-11 of the *Code of Professional Conduct* in that you failed to comply with your Undertaking given to The Law Society of Manitoba ("the Society") on August 18, 2017 and in so doing you failed to discharge your obligations

to your clients, the Society and the public and other members of the profession with honesty and integrity.

2. You acted contrary to Rule 2.1-1 and Rules 3.6-1 and 3.6-2 of the *Code of Professional Conduct* in that you charged and collected from your client M a fee that you did not earn and that was, in any event, not fair and reasonable.
3. Contrary to Rules 3.6-1 and 3.6-2 of the *Code of Professional Conduct*, in cases where you were retained by each of the new clients and each of the existing clients on a percentage basis to assist in claims [for] MPI benefits, you charged and accepted fees and disbursements that were not fair and reasonable and fully disclosed in a timely fashion.
4. Mr. Strell entered a guilty plea to the three charges in the Citation from the Society dated September 20, 2021, amended February 22, 2023, and the parties filed a Statement of Agreed Facts in the hearing before a panel of the Discipline Committee of the Society ("the panel"). The panel finds that the conduct of Mr. Strell detailed in the Statement of Agreed Facts constitutes professional misconduct as set out in the Citation.

#### **Joint Submission as to Disposition**

5. Counsel for Mr. Strell and the Society made a joint submission in respect of an appropriate disposition in this matter as follows:

The parties jointly submit and request that the Discipline Committee Panel dispose of the matter by making a finding that the conduct of Mr. Strell as set out in this Statement of Agreed Facts constitutes professional misconduct as set out in the Citation and order that:

- a. Mr. Strell pay to the Society a fine in the amount of \$7,500.
- b. Mr. Strell pay to the Society a contribution to the costs of the investigation and prosecution of the matter of \$8,000.
- c. Mr. Strell's practice be made subject to the following conditions:
  - i. Effective immediately he shall not directly or indirectly, enter into any contingency contract as defined by Division 5 of *The Legal Profession Act* and may not charge or share in fees for any matter pursuant to any such contingency contract except as set out below.

- ii. Where prior to October 1, 2022 Mr. Strell has entered into a contingency contract for any matter that is not yet completed he may charge a fee based on the contingency contract only if:
  - The terms of the contingency contract including the name of the client, the date of the agreement, a description of the matter, the contingency fee and the contingency (or contingencies) stated to give rise to such a fee is disclosed on a list to be provided to the Society within seven days of the Order;
  - The contingency fee so set out is charged only on the first lump sum payment received of each disputed benefit or for each disputed event and, notwithstanding the terms of the contingency contract, not based on any later payments, whether by installment or otherwise or for any services provided;
  - Prior to the proposed bill being issued to the client and prior to any payment being taken under such a contingency contract, the entire file has been referred to an independent reviewer approved by the Society who has assessed the fairness and reasonableness of the fee in all of the circumstances and then only in the amount assessed by the independent reviewer to be fair and reasonable.
  
- d. Mr. Strell shall not enter into any additional or subsequent retainer with any person whom he has charged a contingency fee and shall not charge or accept any fee from such a person unless and until such additional or subsequent retainer agreement and proposed fee is first assessed as fair and reasonable by an independent reviewer approved by the Society.
  
- e. Mr. Strell shall keep detailed, contemporaneously made records of the work performed and time spent on each client matter and in the case of any matter to which clause (c) or clause (d) applies shall provide those records to the independent reviewer.
  
- f. The Society may conduct compliance inspections as to the above conditions and Mr. Strell shall cooperate with the Society's inspector in each case and shall provide to the inspector such files and records as may be requested.
  
- g. Mr. Strell shall bear the costs of the independent reviewer for the assessment conducted in each case under (c) and (d) above.

As an interim measure, Mr. Strell has agreed, consistent with 8.2(c)(ii), to have any contingency fees reviewed for fees subsequent to October 1, 2022. This includes three proposed contingency fees which have been submitted to an independent reviewer.

The panel accepted the joint recommendation and so advised the parties following the hearing on March 1, 2023, with reasons to follow. These are the panel's reasons for doing so.

## **Background**

### Facts Related to the August 18, 2017 Undertaking

6. The Society raised a concern with Mr. Strell about his client billing practices for claims pursuant to *The Manitoba Public Insurance Corporation Act* and *The Workers Compensation Act*. The Society's position was that it was improper for him to enter into contingent fee arrangements that provided for a fee as a percentage of periodic payments of benefits for an indefinite period of time. Mr. Strell contested the position of the Society. Mr. Strell continued to enter into agreements with clients providing for payment of a percentage of his clients' ongoing periodic payments as fees, with no defined end.
7. By letter dated August 17, 2017, the Society advised that it had come to a preliminary determination of the matter that the practice was contrary to the *Code of Professional Conduct*. It offered to resolve the matter by way of Undertaking regarding this practice, rather than have the matter referred to the Society's Complaints Investigation Committee. It provided Mr. Strell with a draft Undertaking in relation to contingent fee agreements.
8. On August 18, 2017 Mr. Strell entered into the Undertaking and the Society advised that the file on the matter was closed.
9. In part the Undertaking states:  
  
"I will
  1. not enter into any new retainers whereby I charge my client(s) legal fees or provide my clients with the option of being charged legal fees, a percentage of funds received on their behalf on an indefinite basis;
  2. for all existing clients who I have charged as legal fees a percentage of funds received on their behalf on an indefinite basis, immediately;
    - a. cease charging as legal fees a percentage of funds received on their behalf;

- b. notify them in writing that I can no longer charge fees in that manner; and
    - c. come to another fee arrangement with them in which they are not charged as legal fees a percentage of funds received on their behalf on an indefinite basis; and
  3. keep detailed records of work performed and time spent working on all files.”
10. Between August 22, 2017 and December 6, 2019 Mr. Strell entered into retainer agreements with fifty-two new clients in breach of his Undertaking; continued to charge seven existing clients fees on a percentage basis in breach of his Undertaking; and did not keep the required detailed records for work performed on all files in breach of his Undertaking.

#### Facts Related to Client M

11. Mr. Strell's client M had been receiving income replacement indemnity benefits from Manitoba Public Insurance Corporation (MPI) as a result of a pedestrian/vehicle accident. Following an assessment by her MPI case manager, MPI issued a decision terminating her benefits. M sought an internal review, and the internal reviewer upheld the decision. M appealed to the Automobile Injury Compensation Appeal Commission but prior to an appeal and following an assessment by its medical consultant, MPI reversed its position and reinstated her benefits.
12. MPI's decision to reinstate was not known to Mr. Strell or M when she sought his assistance and signed a retainer agreement that provided for fees of one-third of the gross amount received as a result of the accident, whether lump sum or periodic payments. Mr. Strell had not provided any legal services that resulted in MPI's reassessment or decision.
13. Mr. Strell provided information to MPI related to M's employment and income with an explanatory letter. MPI issued a cheque to M care of Mr. Strell for retroactive income replacement payments for \$94,413.77. Mr. Strell took fees at the rate of 25% of that amount. Another cheque for arrears of \$5,016.16 was received by Mr. Strell and fees of 25% were taken on that amount.

#### Facts Related to Fees that were not Fair, Reasonable and Fully Disclosed

14. Mr. Strell's practice was to set a fee of one-third of amounts recovered in every contingent fee retainer agreement regardless of the circumstances of the client's claim. Each case subject to such an agreement was in respect of a claim under a no-fault insurance program where there would never be an issue as to liability for the accident from which the claim resulted.

15. The agreement was applied by Mr. Strell to ongoing payments under the insurance program despite there being no legal services required to generate the insurance payments. Further, after August 18, 2017, Mr. Strell did not advise his clients that he could no longer charge percentage fees on an indefinite basis as required by his Undertaking to the Society.

### **Public Interest Test on Joint Submissions**

16. The panel reviewed the jurisprudence filed and agrees with the analysis provided by Counsel for the Society. The decisions dealt with a number of discipline cases where a joint recommendation was considered by a panel.
17. The decision in *The Law Society of Manitoba v. Sullivan*, 2018 MBLS 9 cites *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43, where the Supreme Court of Canada dealt with the circumstances in which a judge can depart from a joint submission on sentence. After concluding that the public interest test is the appropriate one to consider when dealing with joint submissions, Moldaver, J. states at para. [32], "Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest." At para. [31] he states, "it is more stringent than the other tests proposed and it best reflects the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them."
18. The public interest test is applicable in the decision-making of the Society's panels. Further in *Anthony-Cook*, Moldaver J. quotes *R. v. Druken*, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, at para. 29, that to be contrary to the public interest means the joint submission is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system."

### **Factors Specific to Mr. Strell**

19. Counsel for the Society noted that the circumstances of this case might have given rise to the Society seeking a penalty of disbarment based on a question of governability. However, it was noted that Mr. Strell has practised for more than forty-four years without a disciplinary issue, and the response of Mr. Strell to the charges was to cooperate to find a solution to the issue. The joint recommendation that was reached by counsel for Mr. Strell and the Society meets the mandate of the Society to protect the public interest in the delivery of legal services. The joint recommendation also has a deterrent effect, given the significant financial penalties imposed and the impact on Mr. Strell's practice.

20. Mr. Strell has experience dealing with the MPI and WCB insurance programs and his knowledge of these programs and the benefits available to clients within them is an important legal service. The joint recommendation will not deny clients access to these services. There are available alternative billing methods consistent with the *Code of Professional Conduct* that will allow Mr. Strell to continue to provide these legal services.

### Disposition

21. The panel finds that the joint recommendation of counsel fits within the public interest test established by the Supreme Court of Canada in *Anthony-Cook*.
22. The panel orders that Mr. Strell be subject to the provisions of the joint recommendation as set out in paragraph 5 above.
23. The panel thanks counsel for their submissions and the efforts in reaching an agreement to resolve this matter.

Dated this 20<sup>th</sup> day of March, 2023.



Irene A. Hamilton, K.C. (Chair)



James McLandress, K.C.



Susan Boulter (PR)