

Joel David Menaker: Summary, as Published in *CheckMark*

Joel David Menaker, of Toronto, was found guilty of one charge under Rule 104 of failing to promptly reply in writing to a letter from the Institute, and one charge under Rule 201.1 of failing to conduct himself in a manner that will maintain the good reputation of the profession and its ability to serve the public interest. Mr. Menaker gave an undertaking to the trustee of a deceased client's estate to forthwith provide such financial information and documentation as the estate trustee requested. When Mr. Menaker failed to provide requested documentation, the trustee complained to the Institute. In response to a letter from the director of standards enforcement, Mr. Menaker indicated his intention to provide the information to the trustee within the following two weeks. After six weeks, Mr. Menaker had sent some but not all of the requested information to the trustee. Additional letters were sent to Mr. Menaker by the director of standards enforcement, to which no reply was received. The trustee eventually attended at Mr. Menaker's office and obtained the desired information. Mr. Menaker was fined \$3,000 and charged costs of \$3,000.

CHARGE(S) LAID re Joel David Menaker

The Professional Conduct Committee hereby makes the following charges against Joel David Menaker, a member of the Institute:

1. THAT the said Joel David Menaker, in or about the period April 5, 2002 to November 7, 2002 failed to conduct himself in a manner that 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 he failed to comply in a timely manner with an undertaking given in connection with civil proceedings to provide the estate trustee of the estate of Leon Sharon with any financial information or documentation relating to the estate of Leon Sharon requested by the estate trustee.
2. THAT the said Joel David Menaker, in or about the period March 21, 2003 to July 22, 2003 failed to promptly reply in writing to a letter from the Institute dated March 18, 2003, in which a written reply was specifically required, contrary to Rule 104 of the rules of professional conduct.

Dated at Toronto, Ontario this 25th day of July, 2003.

R. J. ROMANIN, CA - DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Joel David Menaker

DECISION AND ORDER IN THE MATTER OF: Charges against **JOEL DAVID MENAKER, CA**, a member of the Institute, under **Rules 104 and 201.1** of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE JANUARY 20, 2004

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1 and 2, the Discipline Committee finds Joel David Menaker guilty of charges Nos. 1 and 2.

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Menaker be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Menaker be and he is hereby fined the sum of \$3,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Menaker be and he is hereby charged costs fixed at \$3,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
4. THAT notice of this Decision and Order, disclosing Mr. Menaker's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
5. THAT in the event Mr. Menaker fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute 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 this three month period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Menaker's practice or employment.

DATED AT TORONTO THIS 29TH DAY OF JANUARY, 2004
BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY – DISCIPLINE COMMITTEE

DISCIPLINE COMMITTEE re Joel David Menaker

DECISION AND ORDER IN THE MATTER OF: Charges against **JOEL DAVID MENAKER, CA**, a member of the Institute, under **Rules 104 and 201.1** of the Rules of Professional Conduct, as amended.

REASONS FOR THE DECISION AND ORDER MADE JANUARY 20, 2004

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario met on January 20, 2004 to hear charges brought by the professional conduct committee against Joel David Menaker, a member of the Institute.
2. Ms. Barbara Glendinning represented the professional conduct committee. She was accompanied by Mr. John Douglas, the investigator appointed by the professional conduct committee. Mr. Menaker was present and represented by his counsel, Mr. Howard Crosner.
3. The decision of the discipline committee was made known at the hearing on January 20, 2004. The written decision and order was sent to the parties on January 29, 2004. These reasons, given in writing pursuant to Bylaw 574, set out the charges as well as the decision and order.

THE CHARGES

4. The charges laid by the professional conduct committee against Mr. Menaker dated July 25, 2003 read as follows:
 1. THAT the said Joel David Menaker, in or about the period April 5, 2002 to November 7, 2002 failed to conduct himself in a manner that 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 he failed to comply in a timely manner with an undertaking given in connection with civil proceedings to provide the estate trustee of the estate of Leon Sharon with any financial information or documentation relating to the estate of Leon Sharon requested by the estate trustee.
 2. THAT the said Joel David Menaker, in or about the period March 21, 2003 to July 22, 2003 failed to promptly reply in writing to a letter from the Institute dated March 18, 2003, in which a written reply was specifically required, contrary to Rule 104 of the rules of professional conduct.
5. Mr. Menaker entered a plea of guilty to both charges and acknowledged that on the basis of his plea of guilty and on that basis alone he could be found guilty of the charges.

DECISION ON THE CHARGES

The Case For The Professional Conduct Committee

6. Ms. Glendinning filed an agreed statement of facts signed by Mr. Menaker on his own behalf and by her on behalf of the professional conduct committee. She also filed a document brief which contained the relevant documents referred to in the agreed statement of facts.

7. The parties left the Council Chamber and the members of the panel reviewed the agreed statement of facts and document brief.

8. When the parties returned and the hearing resumed, Ms. Glendinning summarized the facts she said were relevant and made submissions on behalf of the professional conduct committee. Mr. Crosner summarized the facts he thought were relevant and made submissions on behalf of Mr. Menaker. The parties withdrew and the panel deliberated.

The misconduct

9. The agreed statement of facts and document brief clearly established that Mr. Menaker gave an undertaking to the estate trustee of the estate of a deceased client to forthwith provide such further financial information or documentation as the estate trustee requested. This undertaking was given in April 2002 when the estate and Mr. Menaker's accounting firm settled the accounting firm's claim for unpaid professional fees.

10. In April 2002 the estate trustee made a request for information. In August 2002 the lawyers for the estate trustee requested copies of all documents which Mr. Menaker had on his computer hard drive or network that related in any way to the former client. Mr. Menaker did not reply and did not provide the information.

11. The trustee wrote to the Institute on August 28, 2002 complaining about the lack of response from Mr. Menaker. Ms. Joanna Maund, the Institute's director of standards enforcement, sent a letter to Mr. Menaker, to which he replied on September 23, 2002, saying that it was his intention to provide the estate with whatever information it required within the following two weeks. In fact, Mr. Menaker did not send any information to the estate trustee for six weeks, and when he did send some documentation on November 7, 2002 the trustee was not fully satisfied. Mr. Menaker eventually provided further documentation to the trustee in March 2003, and invited the trustee to have someone attend at his office if more information or documentation was required. Finally, in July 2003, following an attendance at Mr. Menaker's office, the trustee confirmed that he was satisfied he had received all the necessary information.

12. On January 15, 2003, while the estate trustee was still not satisfied with the documentation which he had received, Ms. Maund wrote to Mr. Menaker asking that he provide additional information to the professional conduct committee. Mr. Menaker never responded to Ms. Maund's letter, despite the fact that Ms. Alison Thomas, the associate director of standards enforcement, corresponded with him by telephone and voice message a number of times in an effort to obtain the requested information; wrote to him on March 18, 2003 again asking for the information and advising that failure to provide it immediately would result in referral of the matter to the professional conduct committee; and finally advised him by email on April 4, 2003 that the matter was being referred to the professional conduct committee.

The Decision

13. When the deliberations were completed, the hearing was reconvened and the chair read the following decision into the record:

DECISION

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, and having heard the plea of guilty to charges Nos. 1 and 2, the Discipline Committee finds Joel David Menaker guilty of charges Nos. 1 and 2.

ORDER AS TO SANCTION

14. Neither party called evidence with respect to sanction but both parties made submissions. Mr. Crosner, with the consent of Ms. Glendinning, filed a letter from Dr. L. S. Kasman dated November 12, 2003, and an excerpt from *The Merck Manual of Diagnosis And Therapy* which set out information concerning cytomegalovirus (CMV) infection, an infectious disease. Ms. Glendinning advised the panel that the submissions with respect to sanction were, in effect, joint submissions.

15. Ms. Glendinning outlined the terms of the order sought by the professional conduct committee, namely a written reprimand, a fine of \$5,000, costs of \$3,000, and the usual notice of the decision and order, including disclosure of Mr. Menaker's name in the notice to be published in *CheckMark*.

16. Ms. Glendinning submitted that in this case the principles of general and specific deterrence should be given priority over the principle of rehabilitation. She submitted that the discipline process itself had already had a desirable rehabilitative effect on Mr. Menaker.

17. With respect to the quantum of the fine, Ms. Glendinning pointed out the aggravating circumstances, which included the fact that it took 15 months for the member to comply with his undertaking, that he only did so after the standards enforcement staff had become involved, and that he did not respond as required to the director of standards enforcement. She submitted that the principles of general and specific deterrence required a fine of \$5,000 for the two charges, as well as the reprimand and notice disclosing Mr. Menaker's name.

18. Ms. Glendinning submitted that while the professional conduct committee's actual costs in this case were a minimum of \$10,000, given Mr. Menaker's financial circumstances \$3,000 was an appropriate order. She pointed out that the partial indemnification for costs could be easily justified, as the counsel fees for two counsel for a half day hearing, according to the tariff which had been accepted by the discipline committee as an appropriate partial indemnification, amounted to \$3,000.

19. Ms. Glendinning submitted that with respect to publication the professional conduct committee was unaware of any circumstances which would make this a rare and unusual case in which the member's name should be withheld.

20. Ms. Glendinning referred to two relatively recent cases, *Herman* and *Mulligan*, as precedents for the fine and costs. She addressed the factors which led to fines of \$2,000 and \$2,500 against Messrs. Herman and Mulligan, respectively, both of whom were found guilty of two charges.

21. Mr. Crosner, on behalf of the member, confirmed that the submissions with respect to sanction were joint submissions, and asked that Mr. Menaker be given 12 months to pay the fine and the costs.

22. Mr. Crosner also referred to the cases of *Herman* and *Mulligan*, and pointed out that Mr. Mulligan's untimely provision of professional services occurred over several years, not 15 months. He also pointed out that in the case of Mr. Herman it did not seem that there were medical reasons to explain, at least in part, the misconduct.

23. Mr. Crosner referred to Dr. Kasman's letter. Mr. Menaker had a liver transplant in 1999 which left him with a suppressed immune system. He was hospitalized during June 2000 and in the early part of 2002 on account of CMV. According to Dr. Kasman, Mr. Menaker has a dread that he could become ill and not service his clients. Mr. Crosner submitted that this obsession (to use Dr. Kasman's term) to provide the required service to clients facing tax filing deadlines explained in part why Mr. Menaker put aside his obligations to a former client throughout the busy period of January to June 2003.

24. Mr. Crosner submitted that the \$8,000 total of the fine and costs sought by the professional conduct committee would be an onerous burden on Mr. Menaker, who at the age of 61 was clearly in the latter stages of his professional career. Mr. Menaker practises knowing that his suppressed immune system leaves him vulnerable to illness. He also has the obligation of being the primary caregiver to his wife who suffered a serious stroke in 1996. Compounding these problems in the last few months is the fact that his business partner has been suffering from cancer.

25. Mr. Crosner stated that while his client was not timely in providing the information and documentation sought by the estate trustee, he eventually did so, and pointed out that the delay resulted in neither loss to the estate nor benefit to Mr. Menaker.

26. When the parties had concluded their submissions the panel deliberated, and at the end of the deliberations the chair summarized the terms of the order. The order itself, which was included with the decision sent to the parties on January 29, 2004, reads as follows:

ORDER

IT IS ORDERED in respect of the charges:

1. THAT Mr. Menaker be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Menaker be and he is hereby fined the sum of \$3,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Menaker be and he is hereby charged costs fixed at \$3,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.
4. THAT notice of this Decision and Order, disclosing Mr. Menaker's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:
 - (a) to the Public Accountants Council for the Province of Ontario;
 - (b) to the Canadian Institute of Chartered Accountants; and
 - (c) by publication in *CheckMark*.
5. THAT in the event Mr. Menaker fails to comply with any of the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute 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 this three month period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Menaker's practice or employment.

Reprimand

27. The panel ordered that Mr. Menaker be reprimanded in writing by the chair as a specific deterrent to stress to him that his conduct was unacceptable.

Fine

28. The panel recognized the concern that a fine which is relatively small can be seen as a license fee rather than as a strong general deterrent. While Mr. Menaker's failure to respond in a timely fashion was unacceptable, given the facts and circumstances of the case, including the member's health and financial difficulties, the panel concluded that a fine in the amount of \$3,000 was appropriate.

Notice

29. Mr. Menaker has enjoyed an unblemished reputation as a chartered accountant for over 35 years. The publication of notice of this decision and order in *CheckMark* disclosing Mr. Menaker's name will, in the view of the panel, serve as a significant specific deterrent to him. It is also the panel's expectation that such a notice should have a substantial general deterrent effect on other members who value their reputations and who should realize that in the event they misconduct themselves it is likely there will be a notice of their misconduct disclosing their names in *CheckMark*. Accordingly, the usual notice was ordered as a general deterrent as well as a specific deterrent. It was not argued, and we do not think there was a basis for an argument, that this is a rare and unusual case in which the member's name should be withheld.

Costs

30. Mr. Menaker's misconduct was the reason for this hearing, and for the expense the Institute has incurred investigating and prosecuting this case. Those costs should be borne, at least in part, by Mr. Menaker. The panel agreed with the professional conduct committee that in the circumstances of this case the amount of the partial indemnity should be \$3,000. As with the fine, the panel concluded that it was reasonable to give Mr. Menaker 12 months to pay the costs.

Expulsion For Failure To Comply

31. In this order, as in all others, there must be a consequence if the member fails to comply with the order's terms. Accordingly, it was ordered that if Mr. Menaker did not comply with the terms of the order he would be suspended from membership for three months, and that if he still did not comply within that three month period he would be expelled. In the event he is suspended or expelled, it will be appropriate that Mr. Menaker return his certificate of membership to the Institute. In the event he is expelled it will also be appropriate that the public be given notice of his expulsion, and the order provides for publication of such notice in a newspaper distributed in the geographic area of Mr. Menaker's practice or employment.

DATED AT TORONTO THIS 2ND DAY OF APRIL, 2004
BY ORDER OF THE DISCIPLINE COMMITTEE

D.W. DAFOE, FCA – DEPUTY CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

S.F. DINELEY, FCA
P.J. HOLT, CA
G.R. PEALL, CA
D.O. STIER, CA
D.J. ANDERSON (Public representative)