

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

MICHAEL MARK WASYLIN

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing: March 8, 2023

Panel: Sarah A. Inness (Chair)
Barry C. Effler
Miriam Browne (Lay Bencher/Public Representative)

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

REASONS FOR DECISION

Background

Mr. Wasylin is a member of the Law Society of Manitoba (hereinafter “the Society”), having been called to the Bar on June 26, 1980. Having practised for more than 42 years, he has no formal disciplinary history. He maintains a general practice with approximately 20% of his work consisting of criminal defence files.

Mr. Wasylin pleaded guilty to two counts in a Citation for breaching the *Code of Professional Conduct* by 1) Failing to discharge his professional responsibilities honourably and with integrity, contrary to Rule 2.1-1; and 2) Failing to provide service that was competent, timely, conscientious, diligent, efficient and civil, contrary to Rule 3.2-1. The Society stayed counts 3 and 4 of the Citation.

Jointly Recommended Disposition

By way of Disposition, the parties jointly recommended a 30-day suspension from the practice of law, and costs to the Society towards the investigation and prosecution of the matters in the amount of \$3,500.00.

At the conclusion of the oral hearing the panel recessed to discuss the matter. When the hearing re-convened the panel delivered its decision orally, endorsing the jointly recommended disposition, with reasons to follow.

These are the panel's reasons.

Facts and Circumstances

The evidence was presented by way of a Statement of Agreed Facts, marked as Exhibit 1. The facts and circumstances comprising counts 1 and 2 arise out of the representation of a young adult person charged with several *Criminal Code* offences.

The Client

Mr. Wasylin was retained to represent his youthful adult client on *Criminal Code* charges, including driving-related offences, in 2018. Although an adult, the client's parents were involved, by consent, in the retainer and communications surrounding the representation.

The MPI Hearing

Related to the driving offences, Manitoba Public Insurance ("MPI") initiated a "show cause" hearing for July 24, 2020, in consideration of suspending the client's driver's licence. Mr. Wasylin was instructed by his client to attend the hearing. Mr. Wasylin notified MPI that he would be appearing to represent his client, but failed to do so.

Subsequently, on July 27, 2020, MPI wrote to Mr. Wasylin to notify him that his client's driver's licence was suspended and that he was eligible to apply for a conditional licence to the Licence Suspension Appeal Board. Mr. Wasylin failed to inform his client that he didn't appear at the hearing, or of the letter of suspension.

The client learned of the suspension when he was stopped by police on September 16, 2020 and charged with the provincial offence of Driving While Disqualified, at which point his vehicle was impounded. Approximately one week later, MPI wrote to Mr. Wasylin to inform him that he could provide written submissions that would be considered by MPI, which could lead to the modification of his client's licence suspension. Mr. Wasylin didn't provide a written submission.

On January 25, 2021, the client received a Notice of Default Conviction and fine of \$938.00 because he failed to take action or appear on the Provincial Offence Notice court date.

Restitution

With respect to one of the *Criminal Code* charges, the Crown ultimately agreed to a resolution of the matter that included payment of restitution in the amount of \$1,072.00. During the summer of 2020, the client and parents repeatedly discussed the restitution payment with Mr. Wasylin, which they believed to be \$500.00. On August 27, 2020 the client provided Mr. Wasylin with a cheque for \$500.00 with a notation, "restitution cell phone" on the memo line. It was deposited into Mr. Wasylin's trust account with a notation, "restitution".

In June 2021, the Crown entered a stay of proceedings because the terms of diversion, other than the payment of restitution, was completed. Mr. Wasylin never paid the court the \$500.00 of restitution monies held in trust, nor did he correct the client and the client's parents of their misunderstanding regarding the restitution amount. In July 2021, Mr. Wasylin advised the client's mother that he was trying to get the best deal with respect to the restitution amount but that was untrue, as that amount was already determined and the matter was concluded.

In June 2022, the client's mother contacted the court office to inquire of the status of restitution as the client's probation order was about to expire and he would be subject to breach if there was non-payment. It was learned that restitution owing was \$1,072.00, not \$500.00, and that no payment had been made. The client then paid \$1,072.00 directly to the courthouse to avoid any penalty.

Trust Accounting Issues

Mr. Wasylin received cash retainer payments from his client's mother in the amount of \$500.00 each on June 30, 2020 and July 6, 2020. Inexplicably, he failed to deposit those monies in trust or issue receipts. On July 18, 2020 Mr. Wasylin received \$750.00 from his client and, inexplicably, failed to deposit those monies into trust.

Mr. Wasylin never issued any statements of account with respect to his representation of his client. Despite this, on May 12, 2021 he transferred \$2,500.00 from the client's seven open files to his general account, \$250.00 of which was from the \$500.00 previously deposited for the "restitution" payment.

Protection of the Public

The legal profession is self-regulating. The purposes underlying 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*: See *The Law Society of Manitoba v. Nadeau*, 2013 MBLS 4, at p.1. It cannot be overstated: protection of the public interest is paramount.

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*". These purposes were accepted as applicable to LSM proceedings in *The Law Society of Manitoba v. Nadeau*, (p.1); *The Law Society of Manitoba v. Sullivan*, 2018 MBLS 9 (para.8).

Joint Recommendations

The panel has been presented with a joint recommendation as to consequences. Joint recommendations of experienced counsel are to be respected. In *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43, the Supreme Court held that a judge (and by

analogy a tribunal such as here) “*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.*”

The test is not whether the judge/tribunal would have imposed the same disposition. The *Anthony-Cook* test has been adopted as applicable to joint recommendations presented in the context of LSM disciplinary hearings: *The Law Society of Manitoba v. Sullivan*, 2018 MBL 9 (paras. 7-9).

Submissions at the Hearing

During the oral hearing, counsel made submissions in reference to the “Ogilvy factors” and the rationale for the joint recommendation, including: (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.” Application of the “Ogilvy factors” has been adopted in prior L.S.M. disciplinary cases: See *The Law Society of Manitoba v. Nadeau*, at p.4; and *The Law Society of Manitoba v. Sullivan*, at para.9.

Mr. Wasylin’s actions were serious and had significant ramifications for his client, however, there have been no prior findings of misconduct in his 42 years of practise. The facts comprising both counts of professional misconduct arise out of the representation of one client and do not represent a widespread pattern of conduct throughout his practice.

Although the misuse of trust funds is always serious, the amount of monies involved and the fact that Mr. Wasylin didn’t personally benefit from his misconduct, led the Society to acknowledge his conduct fell towards the lower end of the spectrum. The panel heard that while Mr. Wasylin had no explanation for what happened to the

cash deposits provided to him, there was no intent to misappropriate the funds or personally gain.

While his failure to serve with integrity and competence created real prejudice to the client, in particular with regard to his licence, the panel was informed that the client was restored through a settlement reached through the Professional Liability Claims Fund (Insurance Department) of the Society. Mr. Wasylin is reimbursing the Society by way of agreed payments, so the members' insurance fund isn't depleted in any way due to his actions.

The public's confidence in the integrity of the profession is maintained by the jointly recommended consequences, which balances the principles of specific and general deterrence with rehabilitation and remediation in this case. While not an excuse, it was explained that Ms. Wasylin was struggling in his practice, owing in part to health-related issues experienced by himself and his spouse during the timeframe of the misconduct. This was confirmed by a medical letter filed as Exhibit 2 at the hearing. The panel is also cognizant of the impacts of the Covid-19 pandemic that was in existence during this timeframe.

It is to Mr. Wasylin's credit that he has taken steps towards restricting his practice and managing some of the stresses that led to the circumstances in which he found himself, for example, by reducing his active caseload and by restricting the amount of time he practises. These proactive steps, combined with the suspension and payment of costs, go a significant way to ensuring public protection concerns are addressed.

Mr. Wasylin practises in a rural community in which he has been a contributing member in various volunteer capacities. The panel is aware that the impact of misconduct on one's reputation and practice is more significant than it may otherwise be for a member practising in a larger city centre.

Finally, while each case is to be assessed on its own circumstances, the concept of "parity", or the range of penalties imposed in similar cases, is a significant factor worthy of great weight. The panel was provided with a series of helpful precedents that demonstrate the Disposition being recommended fell within an acceptable and appropriate range imposed for similar misconduct committed by other members. Therefore, the Disposition meets the *Anthony-Cook* test in that it doesn't bring the

administration of justice into disrepute, nor is it contrary to the public interest. It is, therefore, endorsed.

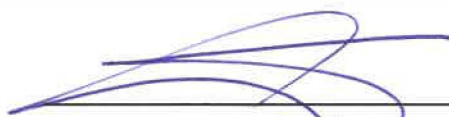
Conclusion and Disposition

The panel is satisfied based upon consideration of all of the facts, including the aggravating and mitigating circumstances, as well as similar sentencing precedents provided to the panel, the joint recommendation proposed is not contrary to the public interest, nor would it bring the administration of justice into disrepute.

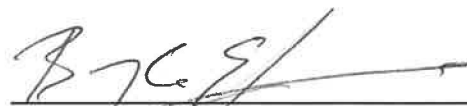
The panel hereby finds the member guilty of counts 1 and 2 of the Citation and imposes the following consequences globally in relation to both counts:

1. Pursuant to s. 72(1)(c)(ii) of *The Legal Profession Act* C.C.S.M. c. L107, suspension from the practice of law for a period of 30 days, beginning on a date to be fixed by the Chief Executive Officer of the Society, and no later than June 1, 2023.
2. Pursuant to s. 72(1)(e) of *The Legal Profession Act* C.C.S.M. c. L107, pay \$3,500.00 as a contribution to the costs of the investigation and prosecution of the charges, on the date and in the manner directed by the Chief Executive Officer of the Society.

Dated this 31st day of March, 2023.



Sarah A. Inness (Chair)



Barry C. Effler



Miriam Browne