**THE LAW SOCIETY OF MANITOBA**

**IN THE MATTER OF:**

**ANAND VARUUN PERSAD (the "Member")**

**- and -**

**IN THE MATTER OF:**

**THE LEGAL PROFESSION ACT**

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| **Hearing Date:** | February 9, 2018 |
| **Panel:** | Grant Mitchell, Q.C. (Chair)<br>Victor Bellay<br>Carmen Nedohin (Public Representative) |
| **Counsel:** | Rocky Kravetsky for the Law Society of Manitoba<br>Gavin Wood for the Member |
| **Charges:** | Integrity (Rule 2.1-1); Competence (Rule 3.2-1); Misappropriating funds (Rule 2.1-1); Misleading a court (Rule 2.1-1); Misleading client (Rule 2.1-1); Misleading associate colleagues (Rule 2.1-1); Misleading the Society (Rule 2.1-1); Timely response to communication from clients (Rule 2.1-1); Timely response to opposing counsel (Rule 7.2-5); Conflict of Interest (Rule 3.4-1); Timely response to the Society (Rules 5-64(3) and 5-64(4)); Failing to take steps on behalf of clients in a timely way (Rule 3.2-1); Timely turning over of file of former client (Rule 3.7-9); Transfer of trust funds to pay account not disclosed to client (Rule 5-43(1)(c); Forging the signature of opposing counsel (Rule 2.1-1); and Failing to honour a trust condition (Rule 7.2-11) |

## REASONS FOR DECISION

**Introduction:**

1. The Member was called to the bar of Manitoba on June 21, 2001. He is 41 years of age. He practised with several law firms but primarily with McRoberts Law Office ("MLO") and with Monk Goodwin ("MG") (January 2008 to October 2015). He was suspended from MLO on June 20, 2016 and has been a non-practising member since June 23, 2016. He is not a member of any other Canadian law society. He practised primarily family law throughout his career.

2. The Member has one prior conviction from the Society (January 12, 2016) for failing to respond to the Society, for which he was reprimanded and paid costs of $1,500 after pleading guilty. That matter arose during the same time period as the matters addressed in this decision and could have formed part of the same parcel of charges, some of which involve incidents that happened prior to the January 2016 matter. The Member practised for over ten (10) years without being subject to any disciplinary convictions.

3. The Member admits the charges and the facts alleged in support of those charges and therefore pleaded guilty. All facts were agreed between counsel in an Agreed Statement that became Exhibit 1 in these proceedings. The parties also agreed on the authorities and rule and statutory provisions that are applicable to these charges, and that the presumptive penalty for charges as serious and numerous as those before us is disbarment from the profession. The issues that divide the parties are 1) whether the Member should be permitted to resign; and 2) the quantum of costs.

**Facts:**

4. Over the span of approximately three (3) years, from 2013 until June 20, 2016, the Member, while practising family law with MG and then with MLO starting in 2015, committed thirty-two (32) violations involving seven (7) different rules (of varying magnitude, although all rule violations are important, but the worst ones, involving integrity and misappropriation, are among the most serious with which Discipline Committee panels deal).

5. There is a multitude of examples of misleading clients, misleading the court, misleading opposing counsel and misleading the Society, all by stating facts about files which he knew to be false.

6. The Member accepted money from clients as retainers for matters and kept the money for himself instead of depositing the money in trust for the client. He transferred money from trust to apply to his invoices without the knowledge or consent of the client. He issued invoices to clients for services he had not provided. These actions involved five (5) different clients. It is admitted that some or all of these transactions amounted to misappropriation of funds and that such misconduct *prima facie* means disbarment of a member.

7. When confronted about the missing retainer money from the trust account, the Member produced an envelope with cash in the amount of the missing money, representing that he had simply failed to deposit the funds. This was a deliberate attempt to mislead counsel and the Society about the misappropriation, as he had in fact only recently placed this envelope on the file. In effect, this was a cover-up of the previous misappropriation.

8. On occasions too numerous to count, he failed to respond to communications from clients, and from opposing counsel and from the Society, either at all or in a timely way.

9. He knowingly double-booked himself for two (2) week-long trials and failed to disclose the double-booking to the clients or the court, and placed himself in a conflict of interest when negotiating a settlement of one of the matters.

10. In one particularly egregious matter, the failure to act on behalf of the client and the misleading of the client as to the progress of the matter cost the client a chance to have custody of the client's children.

11. The Member has made restitution for all misappropriated funds and so his clients are not ultimately out of pocket for the misconduct, but their cases suffered as a result of the bad service provided, and those clients were put to unnecessary stress about their matters.

12. Since withdrawing from practice shortly after his suspension from MLO, the Member has found other employment with modest income, but ultimately declared bankruptcy in September, 2017 and that process is not yet completed (i.e. he is an undischarged bankrupt).

13. The Society has incurred costs of approximately $33,000 in investigating and prosecuting this matter, but based on representations from Mr. Wood on the Member's behalf concerning the financial problems of the Member, the Society is seeking costs of $25,000, which is less than a full reimbursement. The Member has proposed that he be ordered to pay costs of $15,000, but indicates that due to the bankruptcy, he would be unable to pay those costs, at least until he is discharged from bankruptcy.

**Issues on Disposition:**

14. The parties agreed on the applicable law. The Supreme Court of Canada stated in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at p. 1178, paragraph 118:

> "The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation."

15. Many previous decisions of the Society's Discipline Committee have relied on passages from Gavin McKenzie's text, "*Lawyers & Ethics, Professional Responsibility and Discipline*", Carswell 2012. McKenzie lists factors that determine the appropriate penalty for a lawyer who has committed misconduct:

> "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 on 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."

16. In *The Law Society of British Columbia v. Ogilvy* [1999] L.S.D.D. No. 45, [1999] LSBC 17, factors to be considered in determining the quantum of discipline were listed as follows:

> "(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(s); (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."

17. In the *Law Society of Manitoba v. Douglas Melvin Griffin*, Discipline Case Digest, Case 05-03 (June 3, 2005), the panel stated that "in cases of acts of fraud and theft on the part of the lawyer, the penalty of disbarment will be imposed unless there are exceptional extenuating circumstances."

18. The number of offences and magnitude of the offences point clearly to a decision to disbar the Member, unless he meets the onus of proving mitigating factors that would justify the more lenient outcome of allowing the Member to resign.

19. On the Member's behalf, on the issue of mitigation, Mr. Wood informed us that the Member has broken up with his life partner, with whom he had a tumultuous relationship during the time of these offences. The Member now lives in the basement of his parents' house, and his father is dealing with major health problems, making it important for the Member to assist his mother with running the home. The Member took a menial job at a grocery store before obtaining a job in car sales, where at the time of this hearing he has

been working for just under a year, and where he is currently earning around $30,000 per year. The Member fears that when these proceedings are published, it could result in the loss of that job and he would have to start over, with an even more tarnished reputation.

20. Mr. Wood relied on a one-page medical report, dated February 1, 2018 and submitted by consent. The family doctor who signed that report indicated that he had seen and treated the Member from the summer of 2015 until June, 2016 (the time that he withdrew from practice). The doctor identifies anxiety and depression, caused by stressors from both his personal life and his professional life during the time of the offences. The doctor describes the work environment as "hectic" and that "high expectations" had been placed on the Member, which he found overwhelming. This information must have come from the Member to the doctor.

21. The doctor recommended psychotherapy, as well as prescribing anti-depressant medication which appeared effective when an alternative prescription was used.

22. The doctor also noted that the Member was experiencing disrupted sleep during this period, contributing to the anxiety and depression, and that a prescription to address the sleeping problems was also provided. There is no indication as to whether the sleeping pills were effective.

23. The doctor concludes with a statement that the anxiety, depression and interrupted sleep would have contributed to the Member's ability to function during the relevant period.

24. The doctor does not say in the letter, and there is no other evidence on this point before us, that the medical condition caused the behaviour. Indeed, it may have arisen in part from the consequences of the Member's behaviour.

25. Mr. Wood informed us, and the Member confirmed, that he did not pursue psychotherapy, after an initial consult with Dr. Enns (one meeting) and Dr. Rutner (two meetings). No report was provided from either of these mental health professionals, even second hand. The reason Mr. Wood provided for not pursuing the suggested psychotherapy was that it was too expensive for the Member, and that the Member is doing better now despite not having pursued the recommended psychotherapy.

26. There is no doubt that during the period when these offences occurred, the Member was going through several crises in his life that contributed to his misconduct. Personal life stressors can affect our behaviour at work. Lack of sleep is very stressful. Practice, and family law practice in particular, is a very stressful occupation. Anyone would be sympathetic with this Member who must have been experiencing a horrible period in his life. Sympathy alone, however, is not a reason to deviate from a disposition that addresses the principles of accountability, integrity, protection of the public, public confidence in the legal profession and denunciation. Any mitigation must be proportional to the magnitude of the offences committed.

27. It might be said that any member who engages in the type of misconduct that this Member did would be likely to experience symptoms of anxiety, depression and interrupted sleep.

28. Mr. Wood told us that during the worst periods of the relationship problems that the Member experienced in his personal life, he would work half days, or three days per week, or conduct all of his business in a day from his cellular phone from his bed. It is interesting that such behaviour did not raise red flags for the law firms with which he was practising at that time.

29. Mr. Wood told us that the Member's life partner with whom he had the domestic conflict left Winnipeg for an extended period and has now returned, but that the two people are having no contact with each other. He also told us that his recommendation to the Member (and that the Member agreed with this) was that at no time in the future should he try to re-enter the legal profession.

30. In the *Griffin* decision cited above, the panel relied on another passage from the McKenzie text as follows:

> "Evidence that a lawyer's misconduct occurred during a period of stress caused by financial or matrimonial pressures may also be of doubtful value in mitigation of the penalty. The fact that lawyers yield to temptation while under stress may, indeed, be regarded as a sign that they lack the moral strength necessary to be lawyers. As an Ontario discipline committee stated in a 1995 case, 'It is exactly when the stresses are greatest, when compliance with our profession's rules of conduct are most difficult, that members must faithfully hew to the line. Those are the times when lawyers

> must be worthy of being "trusted to the ends of the earth", no matter what difficulties they face.'"

Griffin's health concerns failed to meet the test of "exceptional, extenuating circumstance that exempts him from the penalty of disbarment." The same can be said for the evidence from the Member before us. It might be noted that in the *Griffin* case, a number of reference letters were submitted on his behalf. We had no such evidence in our case.

31. The misconduct in the present case is comparable to the misconduct in the case of *The Law Society of Manitoba v. David Michael Bradley* (February 19, 2016). That panel noted 22 offences over a period of years involving breaches of 10 different Society rules. "He lied to his clients. He failed to serve his clients and provide them with the quality of service they were entitled to expect. He lied to other lawyers. ... Most seriously, he misappropriated client funds. It appears he did not do so in the sense of putting the money into his own pocket, but he clearly did so as a means to cover up his previous lies.... The rule for cases such as this is disbarment in the absence of exceptional circumstances. There are none. Mr. Bradley's cooperation, acceptance of responsibility and expressions of regret, given through his counsel, are commendable, but they do not take away from the seriousness of what he did." The panel disbarred Mr. Bradley and ordered him to pay costs of $22,500, albeit based on a joint recommendation to that effect.

32. We were provided with the case of *The Law Society of Manitoba v. Donald Neil MacIver* (August 26, 2003), where Mr. McIver asked that he be allowed to resign rather than being disbarred, and this was supported by a joint sentence recommendation based on *The Legal Profession Act*, sec. 72(1)(g), which allows the Discipline Committee to "... permit the member to resign his or her membership and order his or her name to be struck off the rolls." As in our case, Mr. MacIver had voluntarily withdrawn from practice, pled guilty, and filed medical reports to demonstrate significant health concerns. In Mr. McIver's case, he had a history of significant positive contributions to the community and supplied numerous letters attesting to his good character. We did not have such evidence. The panel relied on yet another passage from Mr. McKenzie's text dealing with resignations as alternative to disbarment:

> "Cases in which lawyer have been permitted to resign are usually those in which the misconduct is sufficiently serious to justify disbarment, but in which mitigating circumstances persuade the benchers that the stigma of disbarment in addition to withdrawal of the lawyer's right to practise law would be unfair. The practical result of the penalty is the same, except to the extent that an admission committee may give more favourable

consideration to an application for readmission brought by a former lawyer who has been given permission to resign."

33. The *MacIver* decision goes on to cite the three (3) conditions that govern resignation/disbarment cases:

> "Firstly, if the offence is of sufficient severity and there are no significant mitigating factors, then protection of the public through general deterrence demands the heaviest penalty and there is little choice but to disbar. Secondly, in all other cases, the subcommittee should examine the seriousness of the misconduct and possible mitigating circumstances to see if there is a reasonable basis for exercising the compassion mandated by [sec. 72(1)(g)]. Thirdly, the question of whether the lawyer might ever be trusted again to practice law, while potentially a factor in the choice for disbarment, may also be dealt with by the conditions of resignation and left to the authority of the Admissions Committee."

34. The *MacIver* panel went on to state as follows:

> "The Member urged the Panel not to cause him and his family further public humiliation. The Panel of course acknowledges that, while it is never appropriate to impose a penalty with the desire to publicly humiliate a member, stigma resulting from the imposition of a proper penalty is an unfortunate but unavoidable potential by-product of a member's misconduct."

35. Given the number and the seriousness of the charges in this matter, and the time span over which this misconduct occurred, it would take a powerful case in mitigation to warrant allowing the member to resign. The mitigation evidence offered in this case falls far short of that standard. In fact, the mitigation evidence is the type of personal and medical issues that would be likely to be happening to any lawyer who was doing what this Member was doing. It is markedly different from the recent case of JSP, referred to by both counsel, who on a joint recommendation was allowed to resign rather than be disbarred for 28 charges involving similar rule violations to those in our case. JSP produced medical evidence that satisfied the Society that his misconduct in many cases resulted from his addiction to alcohol, and that in fact JSP was under the influence of alcohol when committing many of the violations. It was agreed as a fact that this medical disability was the cause, in whole or in part, of the misconduct, and that he had taken and

was continuing to take rehabilitative steps to address his addiction. JSP was a man in his 70's who was unlikely to seek reinstatement to practice. He had an exemplary career for decades of service to clients and to the community at large and was a leader in his ethnic community. The panel was obliged to accept counsel's joint recommendation unless there were extraordinary circumstances to justify deviating from it. There are many contrasts between JSP's case and ours.

36. The *MacIver* panel found that "if the facts underlying the offence indicate a strong prima facie case for disbarment as the only disposition within the range of an appropriate sentence, then a plea for resignation may arise as an appropriate alternative disposition only in the limited situation where the nature of the mitigating circumstances addresses why the member committed the offence (in effect, the mitigating factors must temper the culpability of the member's commission of the offence and thereby tilt the sentencing objectives away from general deterrence and public confidence)." Applying that test to the facts of *JSP*, one can understand and accept the joint recommendation to allow resignation. Applying the same test to the *Terrence Richard McDowell* case, where the medical evidence convinced the panel that "...it was likely that the actions of the Member were triggered by his mental illness rather than a defect of character," again resignation was an appropriate disposition. Applying that test to our case, as in the Manitoba Court of Appeal decision in *The Law Society of Manitoba v. Lawrence Bremner Cherrett*, [2016] MBCA 119, there is insufficient mitigation to ignore "general deterrence and public confidence" because the medical evidence does not suggest that any underlying medical disability was the cause of this Member's misconduct.

37. When a member is disbarred, or when a member is allowed to resign in a situation such as this, there is an opportunity to seek reinstatement in the future, if the appropriate case for rehabilitation can be made. The normal waiting period after disbarment is ten (10) years and there is no normal period for those who resign (i.e. it could be sooner). The Member told our panel, through his counsel, that he does not intend ever to apply for reinstatement. He is 41 years of age. When the panel suggested to Mr. Wood and to the Member that while there may be no intent to return today, that the Member's mind might change in years to come, they acknowledged this to be true.

38. Taking into account the precedent cases provided to our panel, there is insufficient reason in this matter to deviate from the presumptive disposition of disbarment from the profession. This takes into account the protection of the public (although a resignation without an attempt to seek reinstatement would equally protect the public), the integrity of the profession, the public's confidence in the profession and denunciation for such a large volume of serious violations of the Rules over an extended period of time.

**Costs**:

39. On the issue of costs, we were informed by Mr. Kravetsky that in cases such as these, and especially where the Member does not return to practice, the Society rarely collects the costs ordered. Mr. Wood told us that due to the bankruptcy, the Member could not pay any costs at this time. The Member informed us directly that it is his intent to pay whatever costs are ordered at some time in the future when he is discharged from bankruptcy and doing better financially. In these circumstances, it does not seem unduly harsh to order what the Society has put forward as a "reduced" amount of $25,000.

Issued this 13th day of March, 2018 at Winnipeg, Manitoba.

Grant Mitchell, Q.C.

Victor Bellay

Carmen Nedohin