

**THE LAW SOCIETY OF MANITOBA**

IN THE MATTER OF:

**DOUGLAS ALBERT MAYER**

- and -

IN THE MATTER OF:

**THE LEGAL PROFESSION ACT**

---

**REASONS FOR DECISION**

---

**THE LAW SOCIETY OF MANITOBA**

IN THE MATTER OF:

**DOUGLAS ALBERT MAYER**

- and -

IN THE MATTER OF:

**THE LEGAL PROFESSION ACT**

**REASONS FOR DECISION**

1. This matter was heard in the offices of The Law Society of Manitoba (the “Society”), 200 – 260 St. Mary Avenue, Winnipeg, Manitoba on Tuesday, October 6, 2020 commencing at 1:30 p.m. The hearing was a “virtual” hearing, the panel members attending from remote locations and the parties from separate rooms in the offices of the Society.
2. The panel consisted of Douglas Bedford, Chairperson and Mr. James McLandress Q.C., both members of the Society, and Ms. Susan Boulter, a public representative appointed by the Society.
3. The Society was represented by Mr. Rocky Kravetsky.
4. The member, Mr. Douglas Mayer, was present and was represented by Mr. Gavin Wood.
5. Mr. Mayer admitted to committing two counts of professional misconduct as set out in a Citation issued by the Society on September 9, 2019. He acknowledged that he failed to comply with the Court’s directives made at a case conference on February 17, 2016 with the result that his client’s Statement of Claim was subsequently struck by the Court. Further, he acknowledged that he failed to report the circumstances of this matter promptly to his insurer. We advised the parties on October 6, 2020 that we found this conduct constituted professional misconduct.

6. The parties each made submissions as to an appropriate penalty. After considering those submissions and reviewing Mr. Mayer's prior record we find that Mr. Mayer should be suspended from the practice of law for a period of one month to commence on a date to be determined by the Chief Executive Officer of the Society and, further, that Mr. Mayer pay the costs of the Society's investigation and prosecution of this matter in the amount of \$8,654.99. Our reasons follow.

#### Relevant Facts

7. Mr. Mayer was retained in 2013 by Mr. S.L. in a matter subject to the process set out in Rule 20A of the Queen's Bench Rules. The substance of Mr. S.L.'s Claim involved some unresolved issues, particularly related to income tax, arising out of the termination of a partnership. The third case conference in the proceeding took place on February 17, 2016. At this conference the Court fixed trial dates in June 2017 and directed the parties to file an agreed book of documents by October 1, 2016; directed Mr. Mayer "shortly" after the conference to serve upon defendant's counsel a Notice to Admit Facts; after service of the Notice to Admit Facts, directed the parties to file a statement of agreed facts by October 1, 2016; and directed the parties to file briefs of law and any relevant case law by October 1, 2016.

8. Aside from some settlement discussions in the spring of 2016, nothing transpired with respect to the litigation until September 2016. In that month, counsel for the defendant sent a reminder to Mr. Mayer regarding a draft statement of agreed documents she had earlier sent him and reminded him of the directions given at the case conference. (She subsequently filed her brief of the law on October 3, 2016.). Mr. Mayer's client, Mr. S.L. sent an email to Mr. Mayer reminding him that something had to be filed in Court by October 1.

9. Mr. Mayer drafted an agreed statement of facts and prepared an email dated September 28, 2016 to the defendant's counsel with respect to the draft statement but did not send them. Mr. Mayer discovered his failure to forward the email and statement in February 2017. He was suffering from eye problems in September 2016 and attributes his failure to that. He did not at any time serve a Notice to Admit Facts. He did not at any time file a brief.

10. On February 7, 2017, defendant's counsel served Mr. Mayer with a Motion seeking an order striking the Claim on the grounds that Mr. Mayer had not complied with the directions of the Case Conference judge. Mr. Mayer did not immediately inform his client of the Motion. His client was monitoring the Queen's Bench registry and noticed the filing of the Motion and supporting material and sent emails on February 11, 14 and 20 to Mr. Mayer asking for an explanation. On February 20 Mr. Mayer replied to his client enclosing copies of letters he sent on the same day to defendant's counsel and to the Case Conference judge and expressed the opinion that "no motion will be heard". He did not send copies of the Motion and supporting documents to his client. Indeed, when we heard this matter, Mr. Mayer's counsel revealed that Mr. Mayer did not initially

appreciate that the Motion would proceed and believed for a while that there would simply be a further conference before the Case Conference judge. Mr. Mayer did not advise his insurer with respect to the matter.

11. The motion was heard on March 31, 2017. The Claim was struck and costs were awarded against Mr. Mayer's client. Mr. Mayer reported this result to his client on April 3, 2017. He recommended an appeal and offered to represent his client without charging fees. He provided some criticisms of the Court's decision which criticisms implied that there had been little of concern in his failure to comply with the directions given at the case conference. He recommended that his client seek independent legal advice, though he did not explain whether that was well-advised because his own conduct was the reason the Claim had been struck or whether it was sensible to secure a second opinion regarding the merits of an appeal. Mr. Mayer did not inform his insurer at this time.

12. Mr. Mayer proceeded to file an appeal which was heard on January 25, 2019 by the Court of Appeal and dismissed with costs awarded against Mr. S.L.

13. Mr. Mayer gave notice of this matter to his insurer on September 18, 2018. The insurer subsequently settled Mr. S.L.'s claim against Mr. Mayer.

#### The Member's Record

14. Mr. Mayer was called to the bar on June 30, 1988.

15. For much of his years of practice he has been a sole practitioner, often operating without the benefit of a full time legal assistant. He is currently 60 years of age.

16. It seems that over the years Mr. Mayer has practiced primarily family law. The Agreed Statement of Facts filed in this matter states that currently his practice consists of 96% family law and 4% child protection law.

15. Mr. Mayer has been the subject of disciplinary proceedings on four previous occasions, in 1997, 2011, 2012 and 2015. In addition, concerns regarding his practice have led to two "practice audits", the first in 1999-2000 and the second in 2011.

16. In 1997 Mr. Mayer was issued a formal caution for noting default in a Small Claims matter regarding recovery of his own receivable at a time when settlement was being negotiated and for failing to respond to correspondence from counsel for the defendants, his former clients.

17. In 2011, Mr. Mayer pled guilty to multiple failures, in excess of 20, to respond to communications from clients in three different matters in the years 2007 to 2009. He was fined \$1,500.00 plus costs and ordered to take the Society's remedial Practice Management Course.

18. In 2012, Mr. Mayer was found guilty of two charges of failing to respond to correspondence from the Society and was fined \$1,500.00 plus costs and ordered to take the Society's Time Management Course.

19. In 2015 Mr. Mayer pled guilty to three charges in the same matter for actions in 2011 and 2012 regarding failures to provide the required quality of service to a client seeking to recover her foster children. Mr. Mayer did not pursue the appropriate remedy, did not respond to communications from counsel for the Director of Child and Family Services, did not adequately explain her remedies to his client and twice transferred money from his trust account without rendering a statement of account to his client. He was fined \$3,000.00 plus costs. At the hearing of this matter in 2015, the Discipline Committee was assured that Mr. Mayer had taken steps to ensure that similar transgressions would not occur again in his practice.

20. The lawyers who reviewed Mr. Mayer's practice in 1999-2000 concluded that he had too many active files, seemed unable to turn away new work and did not have an effective system for returning calls. A decade later, the lawyers who reviewed his practice in 2011 noted that he had no bring forward system for actions on his files and there were delays of weeks on some of them in forwarding correspondence to clients and in responding to opposing counsel.

#### The Parties' Submissions on Penalty

21. The Society submitted that Mr. Mayer's conduct in the matter under consideration reflected the same pattern of behavior that had been the subject of previous proceedings - failures to communicate with his client, failures to respond to communications from opposing counsel and failure to follow clear directives and obligations. The Society suggested that in Mr. Mayer's case, the consequence of taking on too much new work seems to have been that existing clients and files did not always receive the attention and standard of service that the clients, opposing counsel and the Court were entitled to receive. The Society observed that Mr. Mayer does not seem to have learned from previous discipline proceedings and was of the view that levying yet more fines did not promise to motivate Mr. Mayer to alter his practice. Accordingly, the Society asked for a two month suspension, suggesting that one month would be scarcely adequate and that anything less would be indistinguishable from a holiday.

22. The Society submitted to us that a period of suspension would be a last opportunity to "bring home" to Mr. Mayer the importance of doing what he ought to have grasped through the remedial courses earlier panels ordered he take. In addition, the Society argued that a period of suspension would, at least for its length, take away any opportunity to repeat the transgressions for that period of time. And, in addition, a period of suspension following a record of higher fines and costs, would send an appropriate message to the public that the legal profession and its governing body expect all lawyers practicing in the Province to provide a "meaningful" level of service and, when they repeatedly fail to do that, there will ultimately be significant consequences that amount to

more than the payment of fines and costs which some might pass off as a cost of doing business.

23. Mr. Mayer submitted that a suspension for the misconduct before us would be a disproportionately harsh remedy. He acknowledged that Mr. S.L.'s file "got out of hand" due to a sequence of "innocent errors". He said he does little civil litigation, as distinct from family law, so this file was an "out-rider". He suggested that a fine of some sort and perhaps a condition that he undertake not to practice any civil litigation would be appropriate. Counsel observed that the Court's decision to strike Mr. S.L.'s claim was "harsh" under the circumstances.

24. Counsel for Mr. Mayer took the unusual step of revealing to the panel Mr. Mayer's income from the practice of law over the last several years. It has been modest. We were told that Mr. Mayer's practice is unique. It consists almost entirely of Legal Aid family law matters. In order to earn a living doing this type of work, Mr. Mayer processes a high volume of files and it is probably only because of his computer skills that he can carry on by himself without an assistant. Currently, he has some 300 open files. His clients represent citizens who are poor and with almost no other lawyers in private practice handling this volume of files, a suspension of Mr. Mayer would likely cause significant hardship to the particular clientele he represents. Indeed, we were told that given the unique nature of Mr. Mayer's practice, particularly the fact that he is a sole practitioner, a suspension of any length, certainly one of two months, would amount to disbarring Mr. Mayer. We were told that in the last four years, Mr. Mayer has experienced some serious health concerns, including operations on both of his eyes in the autumn of 2016. Mr. Mayer's counsel asks, rhetorically, 'how will a suspension magically change' Mr. Mayer?

25. In response to a query from the panel, we were advised that Mr. Mayer just did not "turn his mind" to notifying his insurer in February 2017. His counsel revealed that he had to explain to Mr. Mayer the concern that the Society had regarding his 'self-interest' in continuing to represent Mr. S.L. and in failing to report the matter to his insurer.

26. In reply, the Society observed that a suspension will indeed cause hardship for Mr. Mayer. But, the Society submits that Mr. Mayer's transgressions were not "innocent errors". They were failures to serve his client, a failure to follow the Queen's Bench Rules and a failure to follow the directions of the Court. And, most importantly, these failures followed upon a series of convictions for similar offences and, therefore, a series of "missed opportunities" and "wasted chances" to make changes in his practice.

### Analysis

27. Our concern, as in all discipline cases, is the public interest. The public has an abiding interest in the delivery of legal services with competence, integrity and independence. The *Code of Conduct* stipulates that a "competent lawyer" is one who, among other things, "communicates [sic] at all relevant stages of a matter in a timely and

effective manner” and “performs [sic] all functions conscientiously, diligently and in a timely manner” and “manages [sic] one’s practice effectively”. Rule 3.2 of the *Code* cautions a lawyer not to withhold information from a client or to mislead a client about a matter in order to cover up neglect or a mistake. When a lawyer makes a mistake, Rule 7.8 directs that the lawyer inform the client of “any rights the client may have arising from the error or omission” and that due to the error or omission “the lawyer may no longer be able to act for the client”. The same Rule stipulates that a lawyer “must give prompt notice” to her/his insurer of any circumstances that may give rise to a claim “so that the client’s protection” through that coverage will not be prejudiced.

28. Mr. Mayer did not take issue with the foregoing obligations. We acknowledge that he did, at least, recommend in February 2017 to Mr. S.L. that the latter seek independent legal advice; however, he did not tell Mr. S.L. that the recommendation was essential due to his own error and that as a consequence of that error, Mr. S.L. now had a potential claim against him. And by failing to notify his insurer in timely fashion, he prejudiced Mr. S.L. We do not know whether independent counsel would have been able to defend successfully the motion to dismiss the Claim, but we do think that independent counsel would have promptly filed a brief and served a Notice to Admit Facts, matters which the Case Conference judge observed had still not been done by Mr. Mayer in the weeks following service upon him of the Motion on February 7, 2017.

29. In cases where lawyers have repeatedly failed to manage their practices in accordance with the *Code* and to communicate with their clients and opposing counsel in accordance with the *Code*, the consequence has been the application of more severe penalties. We adopt the rationale for this as set out by the Discipline Committee of the Law Society of Saskatchewan as reported in *Peet v. Law Society of Saskatchewan*, [2019] SKCA 49 at 12:

The justification for progressive discipline is that, as penalties get more severe, the offender will learn from the sanctions and be less likely to continue the offending activity in the future. The opportunity to learn from mistakes is thus a critical aspect of the justification.

30. The Saskatchewan Court of Appeal in the foregoing case upheld the suspension of a lawyer for six months with a fine of \$40,000.00 and the payment of costs for failing to respond to communications from the Law Society of Saskatchewan. The lawyer had over some 17 years been convicted six times for failures to communicate with clients, Law Society and other counsel, breaches of undertakings and unacceptable deficiencies in the quality of his services. The Court found that the sanctions imposed were not unreasonable, notwithstanding that they were severe and much greater than previous sanctions.

31. Similarly, in *The Law Society of Manitoba v. Walsh*, 2006 MBL 5 (aff’d, 2006 MBCA 154), Mr. Walsh was suspended for six months and fined \$25,000.00 plus costs. He had nine previous convictions by the Society for similar breaches of the *Code* with no greater penalty than a fine.

32. We acknowledge that the one month suspension that we have determined to order will impose a hardship on Mr. Mayer, particularly given the circumstances outlined by his counsel. Were the misconduct before us Mr. Mayer's only transgressions in 32 years of practice, we would not be directing a suspension. However, in response to counsel's question, 'how will a suspension magically change Mr. Mayer', we answer by observing that we do not believe that the purpose of the suspension is to work magic or a miracle. We accept the rationale explicit in the precedents, and in our experience, that a suspension provides Mr. Mayer with yet one more opportunity, perhaps his last, to learn from his mistakes and to make those changes in his practice essential to meeting his obligations. It is not our role to identify the defects in Mr. Mayer's practice but there is sufficient evidence in the record before us and in the submissions made to us to suggest that a practice that has 300 open files and no assistant to help to manage that work load may well be the source of the problem. And while we do empathize with Mr. Mayer's situation, it can never be persuasive that an otherwise appropriate penalty be modified due to the financial circumstances of the lawyer or the potential impact on an impoverished class of clients. The quality of service which citizens are entitled to receive must not be dependent on their individual, economic circumstances. With respect to the concern advanced by Mr. Mayer that a suspension of any length will amount to disbarment, we note that the record and submissions included observations that in the autumn of 2016, Mr. Mayer was unable for a period of some two months to do virtually any work due to operations on his eyes. Somehow, he succeeded in coping during that period and in returning to practice. One hopes that he will be able to return, but not to repeat again the failures of the past.

33. In deciding on a suspension of one month, as opposed to the two months advocated by the Society, we are mindful of the 1999 decision of the Law Society of British Columbia in *Law Society of British Columbia v. Ogilvy [1999] LSBC 17, Discipline Case Digest 99/25*. This decision sets out some 13 factors which disciplinary panels are advised to consider in reaching decisions as to penalty. It has been cited favourably by panels of this Society in *The Law Society of Manitoba v. Nadeau*, 2013 MBL 4 and in *The Law Society of Manitoba v. Sullivan*, 2018 MBL 9. Without enumerating all of the factors, we think it of some importance that Mr. Mayer did not benefit in any obvious way from the misconduct which he has admitted. Perhaps, as the Society suggested, if there was benefit, it was indirect in that a potential consequence of taking on every new referral from Legal Aid, and thus more income, was that there was insufficient time to respond to communications and deadlines on existing files. We acknowledge Mr. Mayer's decision to admit liability and thus avoid some of the costs that would otherwise be incurred through a contested hearing on the facts. We believe that the penalty we are imposing is within a range that is consistent with relevant precedents. The fact that for extended periods over 32 years Mr. Mayer has been able to handle many files to a standard that two different sets of lawyers reviewing his practice found to be adequate suggests that there is yet some hope that Mr. Mayer can meet an acceptable standard consistently on all files. And, we observe that Mr. Mayer apologized to the Case Conference judge for his complete failure to follow the Court's directions; however, we note that Mr. Mayer, when before us, did not express any remorse for his



former client and the damage he caused him and nothing in the record suggested that he has ever done so.

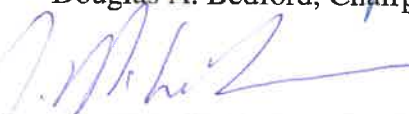
### Conclusion

34. Accordingly, for the foregoing reasons we conclude that Mr. Mayer is to be suspended from the practice of law for a period of one month commencing on a date to be determined by the Chief Executive Officer of the Society and he is to pay the Society's costs in investigating and prosecuting this matter in the amount of \$8,654.99.

These written reasons signed the 22<sup>nd</sup> day of October, 2020.



Douglas A. Bedford, Chairperson



James McLandress Q.C., Panel Member



Susan Boulter, Panel Member