THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

(the "Member A")

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing Dates:	October 19-20, 2021
Panel:	Wendy Stewart (Chair) Dean Scaletta Maureen Morrison (Public Representative)
Counsel:	Ayli Klein for the Law Society of Manitoba Stephen Vincent for the Member

REASONS FOR DECISION

Introduction

1. Member A is a member of The Law Society of Manitoba ("the Society"), having been called to the Bar and admitted as a solicitor on August 13, 2003.

2. He was charged in a citation dated April 12, 2021 ("the Citation") with two separate and distinct counts of professional misconduct for: (a) failing to provide service that was competent, timely, conscientious, diligent, efficient and civil, contrary to Rule 3.2-1 of the *Code of Professional Conduct* ("the *Code*") ("Charge 1"), and (b) communicating with a prospective client in a manner that was abusive, offensive or otherwise inconsistent with the proper to tone of a professional communication from a lawyer, contrary to Rule 7.2-4 of the *Code*("Charge 2").

3. At the commencement of the hearing, Member A:
   (a) acknowledged his membership in the Society;
   (b) acknowledged service of the Citation;
   (c) waived formal reading of the Citation;

(d) raised no objections to the composition of the Panel, either on the basis of bias or conflict; and,

(e) acknowledged the jurisdiction and authority of the Panel to proceed with the hearing.

The hearing was open, but there were no members of the public in attendance.

4. Member A entered pleas of not guilty before the Panel to each of the two counts set out in the Citation. A hearing was conducted via Zoom on October 19-20, 2021. The Panel heard oral evidence from Member A and from four other witnesses: (a) Witness A, called by the Society to provide evidence relating to Charge 2, (b) Witness B, called by the Society to corroborate the evidence of Witness A, (c) Witness C, an employee of Member A called by his counsel to give evidence relating to both of the charges, and (d) Witness D, the client of Member A, also called by his counsel, whose legal matters underpinned the allegations relating to Charge 1.

5. For the reasons set out below, the Panel finds Member A not guilty of each of the two counts set out in the Citation.

The Citation

6. Charge 1 reads:
"While and in connection with your representation of [Witness D] on a family law matter, you acted contrary to Rule 3.2-1 of the *Code of Professional Conduct* in that you failed to provide service that was competent, timely, conscientious, diligent, efficient and civil.

Particulars

(a) Between December of 2018 and December of 2019, you failed to take meaningful steps to ensure that your client received her child support payments, including that:
  i) You received from opposing counsel your client's child support payments but you failed to provide those funds to her on or about:
    1) March 14, 2019;
    2) March 20, 2019; and
    3) April 16, 2019.
  ii) You have no record of receiving further child support payments which were sent to you by opposing counsel on or about:
    1) December 19, 2018;
    2) June 27, 2019;
    3) July 12, 2019; and
    4) October 16, 2019."

Charge 2 reads:
"While and in connection with your representation of the Estate of [Stepfather of Witness A], you acted contrary to Rule 7.2-4 of the *Code of Professional Conduct* in that you

communicated with [Witness A] in a manner that was abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

Particulars

(a) On May 12, 2020, you spoke on the telephone with [Witness A], executor of the [...] Estate, during which call you failed to meet the standard of professional communication from a lawyer in that you:

i) at times slurred your words;
ii) told [Witness A] that she should be reported and jailed for having previously completed her mother's estate without a lawyer;
iii) took a personal call on another line, during which [Witness A] overheard you say, "I am talking to a client. Don't fucking start with me";
iv) commented to [Witness A], in reference to that personal call, "Damn women should mind their own business"; and
v) were generally rude, condescending and intimidating such that [Witness A] cried."

Documentary Evidence

7. In addition to the oral evidence of the four witnesses noted above, the parties filed an Agreed Book of Documents consisting of tabs numbered 1 through 20, with several of the tabs containing several related documents. The parties also submitted a second document, also titled "Agreed Book of Documents", in which they agreed that:

(a) "Each document, or excerpt of a document, was printed, written, signed or executed as it purports to have been";
(b) "Each document, or excerpt of a document, that is said to be a copy is a true copy of the original"; and,
(c) "Where the document, or excerpt of a document, is a copy, the original was sent as it purports to have been sent".

8. The Exhibits in the cause were:

1. Citation dated April 12, 2021;
2. Agreed Book of Documents (tabbed);
3. Agreed Book of Documents (see para. 7 above);
4. Email from Witness A to the Society dated December 10, 2020, attaching a "screen shot of [her] cell [phone] bill"; and,
5. Social Media Posts to the Facebook account of Witness A, numbered 1 through 7.

Nine other documents were marked as Exhibits A through I for identification. These documents were referenced during the cross-examination of Witness A. The Panel asked for, and was granted, access to the documents (some of which were otherwise inadmissible) for the sole purpose of providing context for some of the questions being put to Witness A. None of these documents constitute evidence in the cause, and none were considered by the Panel in its deliberations.

Evidence of Witness A

9. On direct examination, Witness A testified as follows:

(a) Member A had prepared Wills for her mother and her stepfather a year or so before her mother died in 2014, and he stored both of the original Wills at his office. She was the alternate executor named in both of the Wills, and she took over the handling of the estate when deteriorating health prevented her stepfather from continuing with it.

(b) She recalls meeting Member A on two occasions prior to her phone conversation with him on May 12, 2020. Both meetings were brief; the first was to pick up the original Will executed by her mother, the second was to provide Member A with a copy of the Clearance Certificate she had received from the Canada Revenue Agency regarding that estate. She had no issues or problems with Member A on either occasion.

(c) Her stepfather died just after 4:00pm on May 10, 2020. Her first telephone call to the office of Member A was, according to the records forming part of Exhibit 4, placed at 9:44am the following day (May 11, 2020) and lasted for seven minutes. Her next call, during which she says she spoke with Member A, was placed at 4:04pm on May 12, 2020 and lasted for 45 minutes. This call was placed while she and her great-nephew were sitting at her kitchen table, after having spent the day retrieving personal belongings from the care home where her stepfather had been living at the time of his death.

(d) The first call was to inquire about obtaining the original and several notarial copies of the Will made by her stepfather. She spoke with a woman she believed to be the office receptionist, and was told it would take a day or two to confirm whether the office indeed held the original Will and, if so, to produce the requested notarial copies.

(e) The second call, which forms the basis for Charge 2, proceeded as follows:

(1) The woman who answered did not seem to be the same one she had spoken to the previous day, and did not seem to be aware of her request for notarial copies of the Will of her stepfather. She was put on hold, but was not sure for how long. (On cross-examination, she ventured that it might have been 5-10 minutes.)

(2) A man, who identified himself as Member A, came on the line and advised that the Will of her stepfather had been retrieved. He asked her name then noted that she was not the named executor. When Witness A mentioned that her mother had predeceased her stepfather, and that she was the alternate executor named in his Will, Member A said that he did not

recall handling her estate. Witness A then stated that the estate was a simple one, with everything going to her stepfather, so she had handled it herself. At this point, Member A stated: "You should be arrested and put in jail because only lawyers can do estates." (This will be referred to from now on as the "jail comment".) Witness A teared up on hearing the "jail comment", although she knew it was not true as she had already completed the estate herself.

(3) Seeing that Witness A appeared upset, her grand-nephew told her to "put the speaker on". She immediately did so. (Note: The "speaker" function was activated by Witness A very early on so Witness B – who was sitting at the same kitchen table with his aunt – should have been able to hear everything that followed the "jail comment".)

(4) Witness A then told Member A that she needed several notarized copies of the Will and he advised her that they would cost $50 each. She objected, noting that – according to a conversation she had had with her mother shortly after the Wills had been executed – notarial copies were included in the cost of the Wills. In response, Member A said: "Your parents are dead, so that doesn't count." (This will be referred to from now on as the "dead comment".)

(5) She next asked about legal fees to obtain probate. She says Member A laughed at her, and asked why she thought she needed probate. She replied that it was because of the value of the estate; she says she told him it was $70,000 because she did not, at that point, wish to disclose the true value to him. Member A went on to say that he charged $400 an hour for estate work, and that he was "worth it". (This will be referred to from now on as the "estate fees discussion".) Witness A also testified that she was unaware at that time that legal fees for estates were fixed by the *Queen's Bench Rules*.

(6) Witness A says that the conversation then moved on to a discussion of death certificates. She says Member A told her that a Manitoba Vital Statistics certificate was required before anything could be done on the estate, and that it would cost $100 and take six months to obtain one. Witness A says she knew this was not true as she had, when dealing with the estate of her mother, obtained a death certificate from the funeral director (for $25) which was acceptable to the Canada Revenue Agency and to the other entities with which she had had to deal. She says he mocked her and called her "stupid" for thinking that a funeral director could do a death certificate. (This will be referred to from now on as either the "death certificate discussion" or the "stupid comment", depending on the context.)

(7) At one point, Member A said that he would be calling the bank where the deceased had his savings and other accounts, and demanding that all of the estate funds be sent to him to be held in his trust account. (This will be referred to from now on as the "trust account comment".) Witness A said she immediately objected, and that this statement so alarmed her that immediately after concluding the call with Member A, she phoned the bank and expressly instructed them not to send any funds to Member A.

(8) Soon after the "stupid comment", Witness A says she heard another telephone ring in the background. She assumed it was a mobile phone of some kind as she and Member A had been talking on his land line. She says he did not put her on "hold" or "mute" (which she found "unprofessional" on his part), and that he spoke loudly and angrily to whomever the other caller was. He twice told the caller he was with a client, then – in apparent response to something that they said – shouted: "Don't fucking start with me." When Member A got back on the line with Witness A, he muttered: "Women should learn their place." (This will be referred to from now on as either the "other phone call" or the "women comment", depending on the context.)

(9) Witness A says his tone became even more demeaning and condescending following the other phone call. At some point, she thought: "I don't need this right now" and hung up.

(f) Witness A says that Member A was slurring his words right from the outset, but this became more pronounced following the "other phone call". She believed he had been consuming alcohol while they spoke, noting that – having worked in a bar for many years – she was well able to detect signs of intoxication.

(g) Witness A says she retained another lawyer (Member B) a few days later, and that she had no further direct contact with Member A.

10. On cross-examination, Witness A testified as follows:

(a) Taking into account her 5-10 minutes on hold, and assuming Exhibit 4 is correct as to the total length of the call (45 minutes), she agreed that she would have spent about 35 minutes in conversation with Member A. Asked why she had stayed on the line for such a long time while the verbal abuse she had described continued, she said she was "in a state of shock" and that she wished she had hung up sooner.

(b) She began jotting down notes immediately after the "jail comment" (which, as noted above, was soon after the conversation commenced and at about the same time as she activated the "speaker" function). She agreed that she had refused to give even a redacted copy of these contemporaneous notes to the Society; she said

there were things in the notes that were of no concern to the Society, and was of the view that Member A did not need to know the true value of the estate. On this latter point, she conceded that value of the estate had become "public" when the Request for Probate had been filed back in June, 2020, about five months before she filed her complaint with the Society regarding Member A.

(c) Witness A denied that her notes were inconsistent with her evidence before the Panel, and that she would "never forget how [she] was treated that day".

(d) When asked why she did not complain to the Society about the May 12, 2020 conversation with Member A until November 18, 2020, Witness A said she was unaware she could complain and that when she became aware, she did. She also said she was occupied with the administration of the estate, although she added that it was not complicated.

(e) Prior to speaking with Member A on May 12, 2020, she thought she had to use the lawyer who prepared the Will to do the estate work. She later learned from the funeral director that she was free to retain any lawyer she chose. She also said she was unaware of the tariff of legal fees stipulated by the *Queen's Bench Rules* until Member B explained it to her.

(f) During the phone conversation in question, Member A had actually called her "stupid" on two occasions; once during the "death certificate discussion" and again with respect to her doing the estate of her mother on her own.

(g) Member A repeatedly demeaned her and "talked down" to her throughout the conversation, and at one point told her that she needed his express permission to spend any estate money, even for expenses relating to the funeral.

(h) Witness A agreed that neither the "women comment" nor the "trust account comment" was mentioned in her initial written complaint to the Society.

(i) She expressly denied the suggestions that she had "made all this up" or that she had "misunderstood" what had been said by Member A.

Evidence of Witness B

11. Witness B gave his evidence while riding as a passenger in a vehicle on the road home from a work assignment in a northern Manitoba community. On direct examination, he testified as follows:

(a) On May 12, 2020, he had been helping his aunt [Witness A] move "stuff" from the personal care home where her stepfather had been living to the trailer where she lived. They were sitting at her kitchen table when she decided to call a law office about the Will. He had no knowledge of Member A prior to this phone call.

(b) For the first minute or two of the conversation with Member A, the speaker function on the phone was off. His aunt asked for a copy of a Will. Soon after, she started tearing up. It was then that the speaker function was turned on and he could hear both sides of the conversation.

(c) Witness B heard something about "$400 an hour", but he did "not recall too much". (He made several remarks to this effect during his testimony.) He also heard something about "$100 for a death certificate".

(d) Witness B recalled one interruption of their call, when Member A took another incoming phone call. He did not put Witness A on hold while he answered the other call. Witness B said he "heard some mumbling in the background".

(e) After this interruption, Witness B noticed that his aunt "started to get stressed".

(f) At this point, his evidence got somewhat confusing as he said he did "not recall any discussion of copies of a Will". He also said the voice of Member A over the speaker sounded "mumbly, slurry", but added that he had never before spoken with Member A. He later softened the "slurry" observation, saying only that his speech sounded "off".

(g) Witness B said that when the call abruptly ended, Witness A was "angry and upset".

12. Witness B was not cross-examined.

Evidence of Member A

13. In his direct examination, Member A testified as follows:

(a) He has been a practising lawyer, mostly as a sole practitioner, for 26 years; about eight years in the United States of America, and the remainder in Manitoba.

(b) In 2020, his practice was about 45% family law, with the remainder divided roughly equally between Wills and Estates, and Real Estate (or 25-30% each).

(c) His office occupies about 1,800 sq. ft., partitioned into three offices, a boardroom, and a storage area. He generally has two staff – a receptionist/real estate assistant, and a paralegal – but will occasionally have a third person helping out as well.

(d) He does not have a direct phone line to his personal office; all of the outside calls he receives on his land line come through the main line and are transferred to him. It is unusual for him to answer an outside call directly. He has a personal cell phone that he makes limited use of for business purposes; apart from family members, there are only a few court clerks and other lawyers who have his cell number.

(e) He and Witness C both have personal offices with doors that close. Office policy, however, is that the doors remain open except when Member A is on a court call. Their offices are across a hall from each other, and the doors are about 6.5 feet apart. The office acoustics are such that conversations in one office can easily be heard by the person in the other office. In response to a suggestion by his counsel, Member A conceded that he has a "loud conversational voice".

(f) Member A described the office procedure for "cold calls" coming in on estate matters. These calls, if not initially answered by the estates paralegal (perhaps while the receptionist is on a break), are transferred to her. Member A was clear that neither he nor his estates paralegal – who he described as a "gate-keeper" – gives legal advice over the phone; the practice in the office is for her to gather some initial information for file-opening purposes, then make an appointment for a meeting with Member A at which a more in-depth discussion would occur. (Note: He also said that if the only service required was preparation of notarized copies of a Will, his receptionist was perfectly capable of handling the task.)

(g) With respect to Witness A, Member A said he did not recall either of the two brief prior meetings she described in her testimony. He knows he did not speak to her on May 11, 2020 (which is consistent with her evidence), but even after receiving her November 18, 2020 complaint to the Society, he did not recall having spoken to her, as alleged, on May 12, 2020.

(h) With respect to the specific allegations made by Witness A, Member A flatly denied:

(1) charging $50 for notarial copies of Wills which he has stored in a secure location in his office. If the client pays a storage fee at the time a Will or Power of Attorney is prepared, notarial copies are provided, as required, free of charge.

(2) making the "dead comment". He was adamant that he would never say such a thing to a potential client such as Witness A.

(3) that he would use a "condescending tone" in an initial conversation with a prospective client.

(4) that he would have asked about the value of an estate during an initial cold call. An appointment would be made, and identification of the assets of the estate would be one of the topics for discussion at that time.

(5) that he would tell any prospective client that a Vital Statistics death certificate must be obtained, and that nothing could be done on the estate during the six months that it would take to get it (the "death certificate discussion").

(6) that he would insist on having all of the estate funds transferred to his trust account, particularly not during an initial phone call. At an initial meeting, he would discuss what worked best for the executor, keeping in mind their obligation to maintain accurate accounting records for the estate.

(7) that he would ever have made the "jail comment", which he described as "ridiculous".

(8) that he charges $400 an hour for estate administration. What he does, at the initial meeting with the executor, is provide a copy of Queen's Bench Form 74AA ("Form 74AA") and review its terms – specifically with respect to legal fees – with them.

(9) that he would ever have told a prospective client that no estate money could be spent without his approval.

(10) that he would ever belittle a client or call her "stupid". He offered a very personal reason for this, saying: "We do not use the word 'stupid' in our family." (A close family member has a medical condition which is often mistakenly considered as indicative of diminished intelligence.)

(11) that he ever uses the phrase: "Don't fucking start with me." Member A did not deny that he swears at times, but he was adamant that this particular phrase is not part of his normal lexicon.

(12) that he has ever told a prospective client that because he had prepared a Will, they must use his services to administer the estate. His estates paralegal would also be well aware of this.

(13) that he would engage in a lengthy cell phone conversation while on a call with a client. If his cell did ring during a call, he would put the client on hold. If the other call was too complex, he would end it quickly and call the person back later.

(14) that he slurs his words. In particular, he does not have a medical condition or take any medications which would affect his voice or his behaviour.

(15) that he would ever use the phrases: "Damn women should mind their own business" (as set out in the Citation) or "Women should learn their place" (as testified to by Witness A). Member A noted that he has an elderly mother, a wife, and four daughters. In addition, there are two (s0metimes three) other women whose work is critical to the success of his law practice. These phrases do not reflect his attitude towards women, and he would never use either of them.

(16) that he consumes alcohol; not outside of the office, and most definitely not at the office.

(i) With respect to Charge 1, Member A testified as follows:

(1) He had first been retained by Witness D in 2017. By that time, she had been trying on her own for four years to enforce an August 16, 2013 Variation Order, regarding support for their son, against her ex-husband ("the Allen Order"). Her husband a long history (of which she was aware) of neglecting his financial disclosure and support obligations with respect to children he had had with a prior spouse.

(2) Member A obtained an Interim Order, dated October 24, 2017 but not signed until December 13, 2017 (Exhibit 2, Tab 2), requiring the ex-husband to make support payments of $700 per month ($600 for current support, and $100 towards arrears pursuant to the Allen Order), and to provide certain financial information ("the Doyle Order").

(3) Between November, 2017 and December, 2018, Member A received – from Member C (counsel for the ex-husband) – a total of nine CIBC International Money Orders drawn on the account of the ex-husband and payable to Witness D (his client). Each time a money order was received, Witness D was contacted and she attended at the law office to pick it up.

(4) In the meantime, on June 14, 2018, Member A attended a Case Conference (Exhibit 2, Tab 3) at which a proposal from the ex-husband – one that would have him sign over his pension benefits to Witness D in satisfaction of his past and future support obligations with respect to their son – was discussed. These discussions continued over a protracted time frame as a variety of stumbling blocks arose. These included, but were not limited to, the ongoing failure of the ex-husband to provide financial disclosure, a necessary re-evaluation of his support obligations when the tardy disclosure indicated earnings far in excess of what had been expected, finalization of the wording of a complex Variation Order, concerns raised by Member A regarding trust conditions attaching to the money orders he was receiving

from Member C, and initial reluctance on the part of the Maintenance Enforcement office to attach the pension benefits.

(5) It was during the roughly 18-month period between June, 2018 and December, 2019 that the events giving rise to Charge 1 occurred. Starting in March, 2019, Member C sent Member A a total of six money orders payable to Witness D. Three of those (sent on March 14, 2019, March 20, 2019, and April 16, 2019) were received by Member A in the ordinary course, via prepaid first class mail. The other three were also sent by Member C to Member A, again by prepaid first class mail, on June 27, 2019, July 12, 2019, and October 16, 2019. But notwithstanding a diligent search, Member A found no evidence that any of these three were ever received by his office.

(6) With respect to the letters and money orders sent by Member C in March, 2019 and April, 2019, Member A testified regarding concerns he had about the trust conditions which accompanied the funds. Specifically, he was concerned about the potential impact that accepting the conditions could have on their ability to recover the ever increasing arrears under the numerous prior Orders. He met with Witness D and discussed his concerns. He recommended that she not negotiate those three money orders until the concerns had been addressed. Notwithstanding that the money orders (totaling $2,100) would have been of significant and immediate benefit to her and her son, Witness D instructed Member A to retain the money orders on his file while his negotiations with Member C continued.

14. Member A was cross-examined at some length:

(a) With respect to his hourly rate in May, 2020, he said it is $350 now and was probably $300 or so back then.

(b) With respect to record-keeping, he occasionally makes handwritten notes of meetings and phone conversations but his usual practice is to use a tablet for note-taking. He then saves the notes on a portal which is accessible by himself, his staff, and the client.

(c) He agreed that notes protect both the lawyer and the client, and stated that he does take notes when anything of substance occurs during a meeting. If the notes are handwritten, he will usually have the client initial them to acknowledge what was discussed. If something was of particular importance, he would send a confirming email.

(d) In April, 2019, he had a chance meeting and a hurried conversation with Member C when he saw him on the street. Member C said Member A was free to bring motions for financial disclosure and a variation of the support amounts, but he questioned whether it would be worth the time and expense for what could be minimal benefit. Member A said he discussed these realities with Witness D when she came to pick up the three money orders received in March, 2019 and April, 2019. The discussion considered: (1) the decision of Justice Goldberg (Exhibit 2, Tab 1), (2) that her ex-husband had been inconsistent with his support payments to her for, at that point, about 15 years, (3) that he had not made any payments at all between 2013 and 2017 notwithstanding that he had been making $150,000 to $200,000 a year during those years, and (4) that he was in the midst of another divorce where a division of assets was at issue.

(e) His reasons for advising Witness D not to cash the three money orders included: (1) that Maintenance Enforcement was taking the position that arrears under the earlier orders had been satisfied even though her ex-husband had not paid since 2013, (2) that given his considerable undisclosed income between 2013 and 2017, the payments he did make were likely significantly less than he should have paid, and (3) that even at that late date, he still not received sufficient financial disclosure from the ex-husband upon which to base a reasoned recommendation.

(f) He flatly denied that he is an alcoholic. He denied being on any "program" relating to alcohol consumption, indicating that he had had last had a drink 4-5 years ago. He denied "being in denial" about having a "drinking problem".

(g) In response to suggestions that two lawyers and a judge had, at unspecified times, commented on his drinking, Member A acknowledged that one of the lawyers had indeed mentioned the issue. He said that the remark had been made in a northern circuit court setting such as a community hall and that the other lawyer had merely said that he could smell alcohol in the vicinity. It was not even clear to Member A that the comment was in reference to himself.

Member A denied that either of the others had mentioned his drinking. (Note: The named judge died in 2019, and the lawyer who Member A acknowledged having mentioned smelling alcohol died in 2017. The other lawyer who was identified did not testify.)

(h) He denied that his office was "out of control" in 2019, that the three money orders sent by Member C between June, 2019 and October, 2019 had simply been lost, and that they had only been discovered while he was preparing his response to the complaint in November, 2020. He reiterated that he had no idea what happened to the three letters in question; they had not arrived in his office.

Evidence of Witness C

15. Witness C testified that she began working for Member A in early 2019. She performs both legal assistant duties (gathering preliminary information from clients, handling mail, and preparing documents) and paralegal duties on real estate, estates, and family files (meeting clients, and preparing and executing documents).

16. Witness C described the office configuration and acoustics in much the same way as Member A had in his testimony.

17. With respect to incoming "cold calls" on estate matters, Witness C said these are typically answered by the receptionist in the first instance. Unless she is otherwise occupied, the call would then be transferred to her. Witness C would gather some initial information and try to determine whether their office held the original Will. This initial call would typically be quite short.

18. A longer, more in-depth discussion would usually take place the following day. During that call, Witness C would ask for details of the estate assets (to determine whether it was a "Small Estate" or whether probate might be required) and perhaps assist with making an appointment for the client to meet with Member A. She said this second call could last 45 minutes. She indicated a strong preference for Member A not taking these calls as he does not always get all of the information she needs at that stage of the file.

19. Witness C remembered the call from Witness A on May 11, 2020. They at first thought they had some acquaintances in common, but that turned out not to be the case.

20. She did not remember the call from Witness A on May 12, 2020. She did not remember putting such a call through to Member A, but added that her doing so would not have accorded with their usual office procedures.

21. With respect to the specific allegations made by Witness A regarding the call on May 12, 2020, Witness C:

    (a) denied that their office charges $50 for notarial copies of Wills. She said that free copies were provided if the client had paid the storage fee; if not, the fee was $75.

    (b) denied ever hearing Member A speak to a client in a condescending manner.

    (c) did not recall Member A ever telling a client that getting a Vital Statistics death certificate could take six months, but added that with the pandemic, it does in fact take that long now.

    (d) denied ever hearing Member A tell a client that nothing could be done on an estate without a Vital Statistics death certificate.

(e) denied ever hearing Member A tell a client that all estate funds had to be transferred to his trust account. She noted that while it was their preference to hold the estate funds in trust, this was up to the executor to decide.

(f) denied ever hearing Member A threaten a client with arrest and jail for handling an estate on their own.

(g) confirmed that their office charges estate fees in accordance with Form 74AA, except for complex estates. In those cases, a fee agreement would be made with the client, but that would always be done in person. The office currently charges $400 an hour, but in May, 2020 the hourly rate would have been $350.

(h) denied ever hearing Member A tell a client that estate expenses could only be paid with his approval.

(i) denied ever hearing Member A tell a client that they had to use him for the estate if he had prepared the Will.

(j) described Member A as "always compassionate", particularly when dealing with estate clients.

(k) denied ever hearing Member A slur his words.

(l) denied ever seeing Member A intoxicated, in the office or elsewhere.

(m) acknowledged that she had read the complaint Witness A had made to the Society, and said that the allegations were "very inconsistent with her observations of [Member A]".

22. The cross-examination of Witness C was uneventful. She acknowledged that she sometimes assists with giving cheques to clients and obtaining a signature acknowledging receipt. She added that the office does not usually process periodic payments, and that lump sums were more common. She never personally dealt with Witness D, and never opened an estate file for Witness A.

Evidence of Witness D

23. Witness D testified that she retained Member A in 2017 because her ex-husband had not been paying support for their son for the previous four years. An Order was in place, but he did not pay regularly.

24. After the Doyle Order was signed in late 2017, her ex-husband would arrange for money orders to be sent to Member A and she would pick them up there.

25. By early 2019, he had still not made financial disclosure but he was making support payments (although not regularly). In April, 2019, she and Member A discussed what to do with the three money orders he had recently received. It was not clear to either of them whether the payments were for current support or arrears, and she agreed with his recommendation that they be held, uncashed, until the situation could be clarified.

26. In December, 2019, her ex-husband gave her a cheque for $5,000, representing somewhat more than the total of the six uncashed money orders he had sent that year. He had confirmed that none of the money orders had gone through his bank account. This conversation was the first she had heard of the three money orders which Member A says he never received.

27. She recalled that discussions with respect to her ex-husband signing over his pension benefits to her began in June, 2019. Given his past history of "unreliable" payments, she found the proposal "of interest". Taking into account his other financial obligations, the fact that he was injured and off work, and the fact that their son had a disability, she thought it was a "nice idea". When Member A asked whether signing over the pension benefits would be acceptable to her, she said: "Yes." She noted that an Order giving effect to their agreement had been signed in June, 2021, but that they were still waiting for Maintenance Enforcement to do their part.

28. Witness D had no concerns with the services provided to her by Member A, and she has not complained to the Society about him. She still considers him to be "her lawyer".

29. The cross-examination of Witness D was also uneventful. She confirmed that financial support was her primary concern when she retained Member A in 2017. She was comfortable with the pension proposal because it meant getting a lump sum earlier, even if the total amount received was "a bit less".

Submission of the Society

30. Counsel for the Society made the following submissions:

    (a) The authorities clearly establish that the standard of proof to be applied by the Panel is the balance of probabilities.

    (b) Credibility is an assessment of the logic of witness' testimony and its harmony with common sense and reason. The Panel must weigh the totality of the evidence, applying logic and common sense, to determine the appropriate outcome. The Panel must subject the story of each witness to an examination of its consistency with the probabilities. The real test of the truth of the story of the witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable at that place and in those conditions.

(c) With respect to Charge 1:

(1) Member A had an incredibly clear memory of his April, 2019 meeting with Witness D even though he could produce no notes. In particular, again having no notes, he clearly recalled the instructions he received at that time.

(2) With respect to his representation of Witness D, the paragraphs in the Doyle Order dealing with support and arrears were both in force "until further order of the court". In this case, there never was any "further order of the court" prior to April, 2019. Further, the letters from Member C were clear as to how the $700 payments were to be allocated. Finally, Member A failed to advise Member C that the money orders were being withheld.

(3) The Case Management memorandum (Exhibit 2, Tab 12) clearly indicates that the chain of transferring funds from the ex-husband to Witness D was at issue. Member A was untruthful with the Court on this point.

(4) There was nothing unclear about the letters from Member C to Member A (Exhibit 2, Tab 7). The explanation provided by Member A with respect to the withholding of the funds is simply nonsensical; an extra $700 a month would have meant a lot to Witness D at that time.

(5) The December 29, 2019 email from Member A to Witness D (Exhibit 2, Tab 8) is clear that Member A was not aware that the ex-husband had been making payments throughout 2019. He did not even mention the March, 2019 money orders until November, 2020 when the Society specifically asked about them. The likelihood is that they had been left on the file and forgotten about.

(6) There was no reason for Member A to withhold the payments he says he received. There could not possibly have been any adverse impact on the rights of the client as a reconciliation of the support and arrears owed, the amounts paid, and the balance still owing can be done at any time.

(7) The charge is that Member A failed to properly serve Witness D. His client was not getting the money she was entitled to. He took no steps to follow up with the concerns he had raised with Member C in his letter of May 29, 2019 (Exhibit 2, Tab 5). In short, he failed to advance the interests of his client in an appropriate manner.

(d) With respect to Charge 2:

(1) Witness A was very clear about what Member A said to her on May 12, 2020. She is not mistaken. She is not wrong. She will never forget what was said.

(2) Witness A had no "history" with Member A prior to May 12, 2020, and had no motive to fabricate the particulars of the phone conversation with him.

(3) Witness C corroborated Witness A on two specific points: free notarized copies were indeed provided to clients who had paid the storage fee, and Member A did prefer to have estate funds kept in his trust account.

(4) Witness A was unemotional during most of her testimony, and was not shaken with respect to the particulars notwithstanding a vigorous cross-examination.

(5) Witness B corroborated several of the details provided by Witness A in her testimony.

(6) Rudeness equates to conduct unbecoming.

(7) The evidence given by Witness A is in harmony with the circumstances as she described them.

(8) Member A does not recall the conversation on the afternoon of May 12, 2020. Witness A remembers it *very* well.

Submission of the Member

31. Counsel for Member A made the following submissions:

(a) With respect to Charge 1:

(1) The specific charge is that Member A "failed to take meaningful steps to ensure that [Witness D] received her child support payments". The Society cross-examined Member A, and Witnesses C and D, but called no other witnesses.

(2) From the outset of his retainer, Member A was dealing with an unreliable and erratic support payer. He was a chronic non-payer of the court-ordered support and he consistently neglected to provide the court-ordered financial disclosure, in a timely manner or at all.

(3) The proposal to sign over pension benefits, first floated by the ex-husband in June, 2018, was a desirable alternative to the mostly futile attempts to collect periodic support payments. Rejecting the money orders that came to Member A in March, 2019 and April, 2019 would advance the resolution of the pension issue (which had been stalled for many months at that point) because the fact of ever-mounting arrears would put pressure on the ex-husband to move more diligently toward achieving that resolution.

(4) Member A discussed the situation with Witness D, and she expressly instructed him to proceed in the manner he had recommended. The instructions were not reduced to a formal writing signed by Witness D, but they were given and Member A did act upon them. Even if this could be characterized as "bad advice", that is not what Member A was charged with.

(5) Contrary to the submission of counsel for Society, it is not "unbelievable" that Member A and Witness D jointly decided to retain the March, 2019 and April, 2019 money orders on the file; that is exactly what they both said was decided.

(6) What can be fairly described as a "good result" culminated with the signing of a Variation Order on June 28, 2021, which Order entitled Witness D to the entire pension benefit of her ex-husband notwithstanding that he now has other dependents who might have had a claim on those funds. Member A has done his part; now it is up to Maintenance Enforcement to enforce the Order.

(7) Witness D testified that she was content with receiving the lump-sum pension benefit in lieu of periodic support payments. She did not complain to the Society about anything Member A did, or failed to do, on her behalf, and she was happy with the services he had provided.

(8) With respect to the second group of "Particulars" (the "missing money orders"), Member A concedes that three of them were mailed by Member C but maintains they were never received by his office. The Society tendered no documentary evidence with respect to the fourth item (December, 2018), and did not call Member C to testify. These portions of Charge 1 have not been proven.

(b) With respect to Charge 2:

(1) *Macatula* (at Pages 4-5) provides guidance on how the Panel should assess the credibility of the witnesses. (Note: Counsel here cited the same test articulated by counsel for the Society.)

(2) The story told by Witness A was "wildly improbable". What lawyer – absent a significant mental health issue or extreme intoxication – would treat a prospective client in that manner? Further, as established on cross-examination, her evidence before the Panel was inconsistent in several material respects with her written statements to the Society; her story "got better over time".

(3) Witness B was called to corroborate the evidence of Witness A, but he failed to do so in any material respect; in fact, he could not even identify the male voice that he said he heard as being that of Member A. Witness B said he heard something about a death certificate, and about a few other matters, but that was it.

Witness B did not recall any of the most egregious statements attributed to Member A by Witness A. How could he possibly have forgotten those statements? Because they did not happen.

Overall, the lack of corroboration adversely impacts the credibility of Witness A. The Society would not have proceeded with Charge 2 in the absence of at least some corroborating evidence, but Witness B just did not come through.

(4) Member A denied the various statements attributed to him by Witness A, and he had reasonable and plausible explanations for each of his denials. His testimony was not shaken on these points notwithstanding a vigorous cross-examination.

Witness C, who had been working closely with Member A for almost three years at the time of the hearing, corroborated the evidence of Member A on several material points: (i) her office was in close proximity to his, and she heard much of what was said by Member A during the course of a normal day, (ii) she never heard him use the kind of language described by Witness A, (iii) she never saw Member A intoxicated, in or out of the office, and (iv) she never saw him exhibit any of the other behaviours described by Witness A.

(5) Citing Casey at Page 13-25 and the majority reasons in *Li* at Paragraphs 16-17, the Panel must find that egregiously offensive language must have been used by the professional before a finding of "professional misconduct" can be made; "short temper, intemperate language, and rude behaviour" – even if proven – are simply not enough.

Relevant Authorities & Principles

32. Each party submitted a Book of Authorities. A combined list of authorities is attached as "Schedule A". A summary of the principles articulated in the authorities is set out below.

33. (a) Standard of Proof

There is no longer a spectrum of standards of proof applicable in civil cases. The only applicable standard is the balance of probabilities. In particular, there is no standard of "clear, cogent and convincing" proof.
(*Doolan*, citing *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41)

The party asserting a proposition bears the burden of producing the required level of evidence (the evidential burden) to satisfy the trier of fact at the required level of certainty (the standard of proof) that the remedy sought should be granted.
(*Ramdath*)

A standard of proof is a test that sets out the level of certainty required to establish proof in a legal proceeding. There is a spectrum of standards of proof that arises from legislation or from constitutional or common law. Standards of proof fall on a spectrum ranging from the most demanding and exacting standard to the least: … 2) proof on a balance of probabilities.
(*Ramdath*)

In assessing whether a Law Society has met its burden of proof on a balance of probabilities, a discipline panel must be mindful to ensure that they do not allow their deliberations to become a credibility contest. It is not sufficient to find that they prefer one version of events over another. Rather, their question is whether the evidence establishes the conduct of the charged lawyer on a balance of probabilities. If they were simply to choose one version over another, they risk ignoring the possibility that they are unable to determine whom to believe and that as a result the Law Society has not met its burden.
(*Rauf*)

(b) Test for Professional Misconduct

A discipline panel will consider whether the conduct of the charged lawyer was a marked departure from the conduct expected of lawyers. Put another way, the conduct of the lawyer must display the culpability of a gross or aggravated nature, rather than a mere failure to exercise ordinary care.
(Casey §12:2, citing *Strother v Law Society of British Columbia*, 2018 BCCA 481)

It is well-established that even in the absence of a written code of conduct, an individual can still be found guilty of professional misconduct based on a breach of the standards of conduct of the profession.
(Casey §13:3)

Where a profession has established a written code of conduct, a member may still be found to have acted in a manner deserving of sanction even where the conduct does not relate to a specific breach of the written code.
(Casey §13:3)

In assessing whether a professional has engaged in unprofessional conduct, it is appropriate to consider the outcome in similar cases. The case law often has important principles that can and should be utilized in other cases. It is a useful caution that the factual context of individual cases is all important in determining whether there has been unprofessional conduct.
(Casey §13:10)

(c) Assessing Credibility

A witness' memory or ability to recall an event, and the lag time between the event and the testimony, may be tested by cross-examination. The lag time may result in a distortion in the recollection of the event. A cross-examiner is free to probe the stresses and other factors which may have had some impact on the accuracy of the witness' impression.
(Lederman et al §16:170)

The most dramatic quality of cross-examination is its power to detect wilfully false testimony, but more valuable is its capacity for exposing errors of perception, defects of memory or deficiencies of narration. For every perjurer there are scores of honest witnesses whose testimony produces the effect of falsehood because its subject-matter was incorrectly or incompletely observed or inaccurately recalled or inadequately narrated.
(Lederman et al §16:172)

An effective cross-examination may expose bias, detect falsehood, and generally reveal the witness' mental and moral condition and whether his or her evidence is tainted by enmity towards a party.
(Lederman et al §16:173)

The most common method of impeaching the credit of a witness is that of self-contradiction by means of a prior inconsistent statement written or uttered by the witness.
(Lederman et al §16:174)

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. The real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable at that place and in those conditions. A witness may testify what they sincerely believe to be true, but they may be honestly mistaken.

Triers of fact ought to go beyond stating that they believe a witness and say that the evidence of the witness who they believe is in accordance with the preponderance of the probabilities in the case and, if their view is to command confidence, also state their reasons for that conclusion.
(*Macatula*, citing *Faryna v Chorney*, [1952] 2 DLR 354 (BCCA))

The testimony of the witnesses giving contradictory evidence must be viewed in the context of the testimony of other witnesses, which might tend to determine where the preponderance of probabilities lies.
(*Macatula*)

An assessment of credibility is not simply a product of the number of witnesses who assert to a particular version of events. Credibility is an assessment of the logic of witness' testimony and its harmony with common sense and reason.
(*Rauf*, citing *Faryna*)

(d) Quality of Service

A lawyer has a duty to provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil.
(*Code* Rule 3.2-1)

A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation.

A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client, and the need for the client to make fully informed decisions and provide instructions.

A lawyer should ensure that matters are attended to within a reasonable time frame. Expected quality of service standards include: (a) keeping a client reasonably informed; ... (e) taking appropriate steps to do something promised to a client, or

> informing or explaining to the client when it is not possible to do so; (f) ensuring, where appropriate, that all instructions are in writing or are confirmed in writing; (g) answering within a reasonable time any communication that requires a reply; ... (n) avoiding the use of intoxicants or drugs that interfere with or prejudice the lawyer's services to the client; and (o) being civil.
>
> A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result.
>
> Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client.
>
> In the absence of developments, contact with the client should be maintained to the extent reasonably expected by the client.
> (Commentary to *Code* Rule 3.2-1)

(e) Unprofessional Communications

> A lawyer must not, in the course of professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer.
> (*Code* Rule 7.2-4)

Analysis

34. The conduct phase of a professional disciplinary hearing must address two basic issues:

(1) Did the regulator prove the alleged conduct on a balance of probabilities?

(2) If so, did the conduct so proven constitute "professional misconduct" within the context of the applicable common law, the statutory framework of the regulator, and any rules or codes of conduct established by the regulator pursuant to that framework?

If the answer to either of these questions is "No", the member must be acquitted.

35. Where the answer to Question (1) rests on an assessment of the credibility of one or more witnesses, the classic formulation of the test is that set out in the oft-cited *Faryna v Chorney*, [1952] 2 DLR 354 (BCCA):

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged by solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. The real test of the truth of the story of the witness in

such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable at that place and in those conditions. A witness may testify what they sincerely believe to be true, but they may be honestly mistaken."

"A practical and informed person" in the context of Charge 2 would be someone familiar with estate administration practice in Manitoba.

36. Dealing first with Charge 2, Witness A gave her evidence in a straightforward, emphatic manner. Her evidence was vigorously tested and challenged on cross-examination but not weakened or impaired to any material extent. It was not, however, corroborated in any material way by Witness B, who they both testified had been privy to all but the first few minutes of the conversation involving Member A.

37. Member A testified and his evidence was also vigorously tested and challenged on cross-examination but not weakened or impaired to any material extent. While serious, the charges he faced pursuant to the Citation would, upon conviction, have perhaps resulted in a fine or a modest suspension. He would, however, have been taking a significant risk of far more serious repercussions had he embarked on a scheme which involved actively and deliberately misleading the Society by lying under oath at his disciplinary hearing. The Panel is satisfied that Member A had no such intention and that his evidence was both credible and reliable.

38. Witness C was not an entirely disinterested witness, but she also gave her evidence in a straightforward manner. She corroborated the evidence of Member A on some material points.

39. Based upon all of the above, the Panel has concluded that a practical and informed person as defined above would be incredulous if told about the statements attributed to an experienced practitioner who, for a number of years, had devoted approximately one-quarter of his practice to the preparation of Wills and the administration of Estates. In particular, no competent and ethical estates lawyer would:

(a) make the "jail comment";

(b) make the "dead comment":

(c) quote an hourly rate for legal services related to the administration of an estate of average complexity (the "estate fees discussion");

[Note: Form 74AA is publicly available on a number of Manitoba government and court websites. Among other things, it: (i) obligates the lawyer acting on the behalf of the estate to serve copies on the personal representative of the estate and on any beneficiaries impacted by the legal fees and disbursements, within a specified time period, (ii) establishes a tariff of "basic legal fees", calculated based on the sworn value of the estate, which the lawyer is permitted to charge for the administration of

an estate of "average complexity", and (iii) lists "additional services" for which additional legal fees may be charged, subject to the approval of the beneficiaries and the personal representative and, in some cases, the court.]

(d) tell a prospective client that nothing could be done with respect to the administration of an estate until a Vital Statistics death certificate had been obtained, or that obtaining such a certificate would (in May, 2020) cost $100 and take six months (the "death certificate discussion");

(e) tell a prospective client that he would phone the financial institution where the deceased did his banking and demand that they send the funds being held to their name to his law office to be held in his trust account (the "trust account discussion");

(f) tell a prospective client that they must use his services to administer the estate of someone for whom he had drawn a Will; or,

(g) tell a prospective client that no estate expenses could be paid except with his express authority.

The one possible caveat would be that one or more of these statements might have been made if the member was, at the time, in a state of extreme intoxication or in the throes of a significant mental health crisis. The Panel did not hear any evidence that Member A suffers from a significant mental health condition, and the evidence of Witness A with respect to alcohol consumption was emphatically refuted by Member A (who said he no longer drinks *at all*, at or outside of the office) and by Witness C (who had never known him to be intoxicated – at the office, or anywhere else).

40. The Panel also has difficulty reconciling the length of time (about 35 minutes) during which Witness A says she allowed herself to be subjected to the abusive and demeaning treatment which she described in such detail. Witness A is no "wallflower"; she presented as an assertive and self-confident individual throughout her testimony. She did say that wished she had terminated the call sooner than she did, but this still does not explain how it could possibly have gone on for so long (or, for that matter, how Witness B – listening to this unrelenting stream of invective – could have both allowed it to continue and forgotten its salient details).

41. The Panel does not question the sincerity of Witness A, and does not believe that she lied, fabricated her evidence, or was otherwise dishonest with the Panel. But it nevertheless finds that her evidence on the essential points noted above is not "[in] harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable at that place and in those conditions". The Panel finds further that the evidence of Witness B was not sufficiently supportive of Witness A on the critical points to persuade it to favour the version of events as related by her.

42. While these findings are dispositive of Charge 2, the Panel feels compelled to mention several other matters arising from the evidence and the submissions of counsel.

43. The Panel did not hear any evidence of a prior history of animosity involving Member A and Witness A. He did not recall either of the two brief encounters to which she testified, and she expressed no concern or dissatisfaction with respect to either meeting.

The Panel notes that Witness A did not allege that Member A said anything similar to the "jail comment" on the first occasion that they met (which, it seems, would have been an appropriate time to issue such a warning had Member A actually believed Witness A would be behaving illegally, and risking jail, by handling the estate of her mother without retaining the services of a lawyer).

The Panel also questions why Witness A would make a point of providing Member A with a copy of the Clearance Certificate regarding her mother, given that he had not had any involvement at all with the administration of her estate. Why would he need or want the document, and what, if anything, was he expected to do with it? The Panel notes that this second meeting would also have presented an opportunity for Member A to say something like the "jail comment", but she does not assert that he did so.

44. The social media posts (Exhibit 5) were presumably put into evidence to infer that Witness A is an overly emotional, angry, embittered, and perhaps even mentally unstable individual who is "mad at the world". If that was indeed the purpose for adducing this evidence, it missed the mark by a wide margin. The Panel gave no weight to the social media posts, and did not draw any of these types of inferences from them.

45. The allegations concerning the conduct of Member A towards Witness A can perhaps best be described as "disturbing if true". Nobody should be subjected to that sort of insensitive, rude, and boorish verbal abuse, least of all from a lawyer (or any other professional for that matter). It is simply not acceptable behaviour.

46. As noted above in the recitation of the evidence, in response to the "stupid comment", Member A offered a very personal reason for saying: "We do not use the word 'stupid' in our family." While it is not necessary for the purpose of these reasons to specifically identify either the family member or the medical condition, suffice it to say that the reason given by Member A resonated with the Panel and that it had a distinct "ring of truth".

47. Dealing next with Charge 1, it appears to have stemmed from a complaint received by the Society from a Court of Queen's Bench – Family Division judge who was concerned that Witness D had apparently not received the support payments which had been sent to Member A by Member C. As the evidence on this point emerged during the hearing, several points became abundantly clear:

(a) Witness D, after meeting with Member A, expressly agreed with his recommendation that the three money orders received in March, 2019 and April, 2019 not be negotiated

pending resolution of the pension issue. When she testified before the Panel more than two years later, Witness D expressed no dissatisfaction with the work Member A had been doing, and was continuing to do, on her behalf.

(b) Witness D is not an unsophisticated person. She presented as someone fully capable of assessing the options being presented by Member A and making her own decision. It is not without significance that Witness D went into her relationship with her now ex-husband being fully aware of his prior history of failing to provide timely financial disclosure and failing to meet his support obligations, both as ordered by the court on numerous occasions. (See Exhibit 2, Tab 1).

(c) The print-out of the court registry filings on the matter in which Member A represented her (Exhibit 2, Tab 20) shows that the matter had been ongoing since 2004. When Member A was first retained in late 2017, Witness D had had many years of involvement with the family court system and was unlikely to have been under any misapprehensions about what he could do for her and how long it would take. In short, she was a realist.

48. With respect to the letters dated June 27, 2019, July 12, 2019, and October 16, 2019, Member A did not dispute that they had been mailed by Member C (and, in fact, acknowledged in Exhibit 3 that they had been so mailed), but he steadfastly maintained that his office had not received any of them. Member C did not testify, so the Panel does not know whether any of the letters were returned to his office. The Panel did hear testimony from Witness D that, sometime in December, 2019, her ex-husband (after checking his bank account) found that none of the 2019 money orders had ever been cashed. He then gave her a cheque for $5,000, which was $800 more than the total of all six money orders.

49. The Panel acknowledges that while Canada Post has an admirable, and indeed impressive, track record of timely and accurate delivery of prepaid first class mail, it is by no means flawless. Items of mail can and do go astray. Member A testified to a number of difficulties in this regard that he is personally aware of involving himself and other local lawyers.

50. The Panel does find it unusual that three letters, sent at different times from the same addressor to the same addressee, would all fail to be delivered, but the Panel simply has no evidence before it to refute the adamant declaration by Member A that none of those three mailings were received by his office. (Given that Canada Post has no way of tracking non-registered items deposited to its system, the absence of rebuttal evidence on this point is no criticism of the Society or its counsel. But the fact of its non-existence does not change the reality that the Panel heard evidence that these three letters were never received by Member A, and has nothing before it to refute that evidence. And it perhaps goes without saying that a member of the Society cannot safely be convicted of losing or otherwise mishandling correspondence that they never received.)

51. The Panel finds that Charge 1 has not been proven to the requisite standard.

Disposition

52. The Panel is indebted to both Ms. Klein and Mr. Vincent for their competent and civil conduct of the proceedings, and for their concise, relevant, and thoughtful submissions.

53. Based on its findings and conclusions flowing from the evidence, and on the relevant authorities cited above, this Panel directs that acquittals be entered on each of the charges set out in the Citation dated April 12, 2021.

DATED this 14 day of December, 2021.

Wendy Stewart

Dean D. Scaletta

Dean Scaletta

M. Morrison

Maureen Morrison

Schedule A
Combined List of Authorities

Statute, Code, and Rules
The Legal Profession Act, CCSM, c. L107, ss. 3(1), 3(2)(b), 4(5), 4(6), 64(10(a), 66, 70(a), 71(1), & 72(1)
Code of Professional Conduct, Rules 3.2-1 & 7.2-4
Rules of the Law Society of Manitoba, Division 8 – Disciplinary Proceedings, in particular Rules 5-94(1), 5-96(1), 5-96(2), 5-96(5), 5-96(6), 5-96(7), & 5-96(8)

Standard of Proof
Doolan v Law Society of Manitoba, 2016 MBCA 57 (paras. 52 & 87)
Director of Criminal Property and Forfeiture v Ramdath et al, 2021 MBCA 23 (paras. 12, 14, & 19-20)

Test for Professional Misconduct
Casey, James T., *The Regulation of Professions in Canada* (2021), Thomson Reuters Canada Limited (pp. 13-1 to 13-5, &13-23 to 13-29)

Assessing Credibility
Lederman, Sidney N., Bryant, Alan W., & Fuerst, Michelle K., *The Law of Evidence in Canada, Fifth Edition* (2018), LexisNexis Canada Inc. (pp. 13, & 1236 to 1244)
Macatula v Tessier et al, 2003 MBCA 31 (paras. 7, 10, & 23)
Law Society of Alberta v Rauf, 2021 ABLS 24 (paras. 16-17, & 24)

Quality of Service
The Law Society of Manitoba Discipline Case Digest 15-14 (*Turner*)
Reasons for Decision, *The Law Society of Manitoba v Stienstra*, 2016
Reasons for Decision, *The Law Society of Manitoba v Baker,* 2017
The Law Society of Manitoba Discipline Case Digest 20-04 (*Mayer*)

Unprofessional Communications
The Law Society of Manitoba v Hogue, 1995 MBLS 3
Li v College of Pharmacists of British Columbia, August 12, 1994, BCCA (paras. 11-12, 14, 20, 41, 44, 50, 52, & 54)
Reasons for Decision, *The Law Society of Manitoba v Orlikow*, 2018
Law Society of Alberta v Rauf, 2021 ABLS 24