

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF JASON MCKEN
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Moira Vane – Chair
Grace Brittain – Adjudicator
Walter Pavlic, KC – Former Bencher

Appearances

Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Jason McKen – Self-represented

Hearing Date

November 24, 2023

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. The following citations were directed to hearing by the Conduct Committee Panel on March 15, 2022:
 - 1) It is alleged that Jason McKen failed to provide competent, conscientious and diligent service to his client, R.L., and that such conduct is deserving of sanction;
 - 2) It is alleged that Jason McKen failed to provide competent, conscientious and diligent service to his client, B.D., and that such conduct is deserving of sanction;
 - 3) It is alleged that Jason McKen failed to provide competent, conscientious and diligent service to his client, S.A., and that such conduct is deserving of sanction; and

- 4) It is alleged that Jason Mcken failed to identify his clients, R.L. and S.A., as required by the Rules of the Law Society of Alberta, and that such conduct is deserving of sanction.
2. Jason Mcken was admitted as a member of the LSA on July 27, 2007. His practice has been, and was at all material times, focused entirely on criminal law. He has a prior disciplinary decision where he served a two-week suspension and paid \$3,500.00 in costs.
3. By way of a Statement of Admitted Facts, Exhibits and Admissions of Guilt (Statement) signed by Mr. Mcken on February 6, 2023, Mr. Mcken admitted his guilt with respect to the four citations.
4. On March 14, 2023, a panel of the Conduct Committee found the Statement to be in an acceptable form. Accordingly, pursuant to section 60(4) of the *Legal Profession Act (Act)*, the Conduct Committee's acceptance of this Statement was deemed to be a finding of this Hearing Committee (Committee) that Mr. Mcken's conduct was deserving of sanction. The sole remaining issue for this Committee was sanction.
5. Mr. Mcken and counsel for the LSA presented the Committee with a joint submission in regard to sanction. After reviewing the Statement, evidence and exhibits, and hearing the submissions of the LSA counsel and Mr. Mcken, the Committee accepts the joint submission based on the Statement of Admitted Facts and finds that the appropriate sanction is a suspension. In accordance with section 72 of the *Act*, the Committee orders that he be suspended for 45 days, which will commence on July 8, 2024. The delay of the suspension is ordered as the Committee believes it is in the public's interest that Mr. Mcken's clients not have their currently scheduled matters further adjourned due to his unavailability, coupled with the low likelihood of their ability in procuring new counsel at this late date.
6. In addition, pursuant to section 72(2) of the *Act*, the Committee orders Mr. Mcken to pay costs of \$7,500.00. Mr. Mcken has one year to pay the costs.

Preliminary Matters

7. There were no objections to the constitution of the Committee or its jurisdiction and as a private hearing was not requested, a public hearing into the appropriate sanction proceeded.

Statement of Admitted Facts and Admission of Guilt

8. The facts that were put before the Committee are set out below.

Citation #1

9. In early 2019, Mr. McKen was retained by R.L. in relation to criminal charges of assault, breaking and entering, and mischief.
10. On May 2, 2019, Mr. McKen attended an appearance in Court on R.L.'s matter and scheduled a trial for August 1, 2019.
11. Mr. McKen failed to diarize the August 1, 2019 trial date in his calendar. As a result, he failed to communicate with R.L. or the Crown prosecutor prior to that date.
12. On August 1, 2019, R.L. attended Court for his trial but Mr. McKen failed to appear. Duty counsel stepped in and adjourned the matter to December 5, 2019.
13. On November 27, 2019, Mr. McKen brought an application to adjourn R.L.'s trial because he was double-booked on December 5, 2019. The application was denied, and Mr. McKen had to reschedule the other matter.
14. On December 4, 2019, Mr. McKen contacted R.L. to discuss his trial that would be starting the next day.
15. On December 5, 2019, Mr. McKen attended Court with R.L., who pled guilty to some of the alleged offences and received a Conditional Sentence Order and probation.
16. Mr. McKen admits that he failed to serve R.L. at the standard of a reasonably prudent lawyer because he:
 - a. failed to diarize, prepare for, and attend the trial on August 1, 2019; and
 - b. only contacted R.L. on December 4, 2019 to discuss his trial the following day.

Citation #2

17. In December 2018, Mr. McKen was retained by B.D., who had been charged with assault.
18. On February 19, 2019, Mr. McKen attended an appearance in Court for B.D.'s matter and adjourned the matter to March 5, 2019 in order to obtain instructions.

19. On March 5, 2019, Mr. McKen failed to attend an appearance for B.D.'s matter. The Crown prosecutor adjourned the matter to March 19, 2019, with a warrant to hold for B.D.
20. On March 19, 2019, B.D. attended his next appearance in Court.
21. Mr. McKen subsequently scheduled B.D.'s trial for June 6, 2019. The day after scheduling this trial, Mr. McKen wrote to the Crown prosecutor on B.D.'s matter to advise that he had inadvertently double-booked himself on June 6, 2019 and asked for B.D.'s matter to be brought forward on April 16, 2019 to schedule new trial dates.
22. On April 16, 2019, B.D.'s matter was brought forward, but Mr. McKen did not bring an application to adjourn the trial. The matter was put over to May 7, 2019.
23. On May 7, 2019, B.D.'s matter was brought forward again and adjourned to the trial date of June 6, 2019.
24. On June 6, 2019, Mr. McKen and B.D. failed to attend at the trial. The matter was adjourned to June 18, 2019.
25. On June 7, 2019, Mr. McKen received an email from the Crown prosecutor on B.D.'s matter that stated as follows:

This matter was in Court yesterday for trial. Neither you nor your client were present. My witnesses were, including the young complainant. I agreed to adjourn the matter to June 18, 2019 at 1:30 PM with a warrant to hold for your client, primarily because it is not like you not to be present for a Trial.

I will leave my offer to resolve via Peace Bond open as this young man does not have a record. However, if this matter is set for trial again that offer will not be renewed.

Please be advised that if you are not present with instructions from your client in regards to either resolution or setting a new trial date, or if [B.D.] is not present himself, we will be asking for the warrant to be released.

26. Later that day, Mr. McKen responded to the above-noted email as follows:

First let me apologize for what happened. Somehow this did not get diarized properly. As a result, the matter was not in my calendar.

I expect that he will take the peace Bond. I do not have instructions, but I will have them by the next return date.

27. Mr. McKen did not advise B.D. of the missed trial at this time.
28. B.D.'s matter was adjourned several more times and ultimately set down for another appearance on August 6, 2019. That day, Mr. McKen sent B.D. a text message informing him of the missed trial date in June. It stated as follows:

This is Jason McKen for [B]. Unfortunately [sic], due to calendar error, I missed your trial. However there is no warrant. I explained to the judge and she put it over to set a new trial date. You have court today in Fort McMurray, but you do not need to come to court. Today is not your trial. Today is just to set a trial. I do need however to get your confirmation that you got this message, and I will be pleading you not guilty again and getting you another trial date. I will let you know that today or tomorrow. Please text me acknowledging that you received this. Thanks.

29. B.D. responded to the above-noted text message, but Mr. McKen did not follow-up with him about his next trial date.
30. Also on August 6, 2019, Mr. McKen had an agent appear on his behalf to speak to B.D.'s matter. This matter was adjourned to August 20, 2019 and the Court directed B.D. to attend at that time, but Mr. McKen did not advise B.D. to do so.
31. On August 20, 2019, B.D. failed to attend Court and a warrant was issued.
32. On October 22, 2019, Mr. McKen attended a further appearance for B.D.'s matter and adjourned it to November 19, 2019 to set a date for trial.
33. On November 19, 2019, Mr. McKen and B.D. failed to attend the next appearance for this matter. Duty counsel stepped in to adjourn the matter to December 3, 2019.
34. On November 30, 2019, Mr. McKen sent a text message to B.D. informing him that he was required to attend Court on December 3, 2019.
35. On December 3, 2019, Mr. McKen appeared in Court for B.D.'s matter and a trial was scheduled for June 2, 2020.
36. On June 2, 2020, the charge against B.D. was withdrawn.
37. Mr. McKen admits that he failed to serve B.D. at the standard of a reasonably prudent lawyer because he:

- a. failed to attend appearances on March 5, 2019 and November 19, 2019;

- b. failed to adjourn the trial on June 6, 2019 even though he was double-booked that day;
- c. failed to attend, and advise his client to attend, the trial on June 6, 2019;
- d. failed to advise B.D. of the missed trial date in a timely way; and
- e. failed to advise B.D. to attend Court on August 20, 2019.

Citation #3

- 38. In 2018, Mr. McKen was retained by S.A., who had been charged with assault with a weapon and carrying a weapon for the purpose of committing an offence. S.A. had an upcoming court appearance on September 19, 2018.
- 39. On September 19, 2018, Mr. McKen and S.A. each failed to attend Court for her appearance, and a warrant was issued for her arrest.
- 40. On January 2, 2019, Mr. McKen scheduled S.A.'s trial to commence on August 15, 2019.
- 41. On August 14, 2019, Mr. McKen sent S.A. an email that stated as follows:

This is Jason McKen.
I apologize for this. Trial is *tomorrow* at 9:30am.
Please call or email me or text me.
I will see you then. Regards, ...

- 42. On August 15, 2019, S.A. failed to appear in Court and a warrant was issued for her arrest.
- 43. On March 11, 2020, S.A. pled guilty to her initial charges. The matter was adjourned to March 18, 2020 and then, due to the Covid-19 pandemic, it was later adjourned to July 8, 2020.
- 44. On July 8, 2020, Mr. McKen and S.A. both failed to appear in Court. A warrant to hold was issued for S.A. and the next appearance was set for August 5, 2020. There were several more adjournments after that date and S.A.'s matter was ultimately set down for sentencing on September 30, 2020.
- 45. On September 17, 2020, Mr. McKen received an email from the Crown about S.A.'s matter, which included the following:

...451P1 and 437P1 are both fail to attend court charges that stem from information ..., which is set for sentencing September 30, 2020. Could these two fail to attends be resolved and dealt with at the same time as

the substantive charge is sentenced? If not, are you willing to discuss her defence so I can decide if it is worth proceeding with these charges or not?

46. On September 20, 2020, Mr. McKen wrote to the Crown prosecutor on this matter and advised that both of S.A.'s failures to attend were his fault, and that he would put this on the record.
47. On September 21, 2020, the Crown responded as follows:

I am not sure I can accept that. 437P1 was a trial. 451P1 was a docket appearance. She was arrested on her warrants months later. If it had been counsel mistake, she would have taken steps to address it sooner. If that is her position, we can leave them set for trial.
48. On January 13, 2021, S.A.'s initial criminal matter proceeded to sentencing, and she received a suspended sentence and probation.
49. Ultimately, S.A. retained another lawyer to assist with her outstanding matters, so Mr. McKen could give evidence at the trial and take responsibility for her failures to attend.
50. Mr. McKen admits that he failed to serve S.A. at the standard of a reasonably prudent lawyer because he:
 - a. failed to attend, and advise S.A. to attend, appearances on September 19, 2018 and July 8, 2020;
 - b. only contacted S.A. on August 14, 2019 regarding her trial the following day, which she did not attend.

Citation #4

51. Rule 118.6 of the Rules of the Law Society of Alberta (Rules) requires that Mr. McKen verify the identity of his clients.
52. Mr. McKen did not obtain identification for my clients R.L. and S.A. as required by the Rules.

Analysis and Decision

52. Counsel for the LSA and Mr. McKen made a joint submission on sanction consisting of a 45-day suspension to commence July 8, 2024, and agreed to costs in the amount of \$7,500.00, with one year to pay.
53. Pursuant to the LSA's Pre-Hearing and Hearing Guideline, a hearing committee is not bound by a joint submission on sanction, but it is to be given significant

deference. A hearing committee should not depart from a joint submission on sanction unless it brings the administration of justice into disrepute or is otherwise contrary to the public interest.

54. The joint submission of a suspension of 45 days was well within the acceptable range of sanction for the conduct at issue. The approach taken by both Mr. McKen and the LSA in dealing with this matter through the Statement and a joint submission on sanction avoided an unnecessary contested hearing, witness inconvenience, and increased costs.
55. The Committee concludes that it is in the public interest to accept the joint submission.

Concluding Matters

56. Mr. McKen will have one year from the date of the hearing to pay the costs of \$7,500.00. He will commence his suspension of 45 days on July 8, 2024.
57. A Notice to the Profession is required.
59. There is to be no referral to the Attorney General in this case.
60. The exhibits, other hearing materials, and this report will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than Mr. McKen will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated April 11, 2024.

Moira Vane

Grace Brittain

Walter Pavlic, KC