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 MARK G. DAMM
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee

Sanjiv Parmar – Chair and Bencher
Barbara McKinley – Adjudicator
Anthony Young, KC – Adjudicator

Appearances

Shanna Hunka – Counsel for the Law Society of Alberta (LSA)
Mark G. Damm – Self-represented

Hearing Date

May 16, 2023

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. The following citations were directed to hearing by the Conduct Committee Panel on July 19, 2022:

    1. It is alleged that Mark G. Damm failed to comply with the conditions and reporting requirements for operating a trust account and that such conduct is deserving of sanction;

    2. It is alleged that Mark G. Damm failed to comply with Rule 119.19(4) by paying personal bills directly from his trust account and that such conduct is deserving of sanction;

    3. It is alleged that Mark G. Damm failed to comply with Rule 119.21 by withdrawing money from his trust account for fees and disbursements prior to delivering a Statement of Account to his clients and that such conduct is deserving of sanction;

4. It is alleged that Mark G. Damm failed to comply with Rule 119.22(1) by making withdrawals from his trust account using an ATM and that such conduct is deserving of sanction;

5. It is alleged that Mark G. Damm failed to comply with Rule 119.24(3) by failing to report a trust account shortage to the Law Society and that such conduct is deserving of sanction;

6. It is alleged that Mark G. Damm failed to comply with Rule 119.30 by failing to submit his annual Law Firm Self-Report and Electronic Data Upload by the due date and that such conduct is deserving of sanction;

7. It is alleged that Mark G. Damm failed to comply with Rule 119.36(4)(d) by failing to properly conduct and maintain monthly bank reconciliations of his trust account and that such conduct is deserving of sanction;

8. It is alleged that Mark G. Damm failed to be honest and candid with his clients, A.R. and M.R., and that such conduct is deserving of sanction; and

9. It is alleged that Mark G. Damm practiced while administratively suspended and that such conduct is deserving of sanction.

2. Mr. Damm was admitted to the LSA on June 28, 1991. He has been active and practicing except for the following two periods: Between July 3, 2020, and September 29, 2020, as he was suspended for failing to file his trust safety annual report; and between January 1, 2021 and March 16, 2021, as he was suspended for failing to pay his membership fees. In 2017, he transitioned from his firm in Calgary to move to Cochrane and became a solo practitioner. His practice includes corporate commercial, wills and estates, and builder's liens.

3. On May 16, 2023, the Hearing Committee (Committee) convened a hearing into the conduct of Mr. Damm based on nine citations.

4. After reviewing all of the evidence and exhibits and hearing the testimony and arguments of the LSA and Mr. Damm, for the reasons set out below, the Committee finds Mr. Damm guilty of conduct deserving sanction on nine citations, pursuant to section 71 of the *Legal Profession Act* (*Act*).

5. The Committee also finds that, based on the facts of this case, the appropriate sanction is suspension. In accordance with section 72 of the *Act*, the Committee orders that Mr. Damm be suspended for six weeks, starting on August 1, 2023.

6. In addition, pursuant to section 72(2) of the *Act*, the Committee orders costs in the amount of $12,000.00, to be paid in full by February 1, 2025.

Preliminary Matters

7. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested.

Agreed Statement of Facts/Background

8. LSA counsel and Mr. Damm introduced a Statement of Admitted Facts, Exhibits, and Admission of Guilt. (Agreed Facts). There was a typo identified on the Agreed Facts on paragraph 32, and the word “here” was replaced with “there.” The Agreed Facts were admitted.

9. Both Mr. Damm and the LSA agree to the facts as outlined in the Agreed Facts. A summary of the Agreed Facts as it relates to each of the citations is set out below.

Citation 1: It is alleged Mark Garnett Damm failed to comply with the condition and reporting requirements for operating a trust account

10. On March 29, 2017, the LSA approved Mr. Damm’s Application to Designate a Responsible Lawyer and Operate a Trust Account. He was notified by letter that his approval was subject to the following conditions:

    1) That he hire qualified accounting staff
    2) The use of PCLaw Software to record his law firm trust and general transactions and complete monthly reconciliations; and
    3) Pursuant to Rule 119.30(5), submit his Trust Safety Accounting Upload (Accounting Upload) electronically to the LSA within one month after his designated filing date (January 31, 2018).

11. In addition, he was advised of the following reporting requirements:

    1) Retain an accountant to submit a Start Up Report within four months of being approved to operate a trust account;
    2) Annually submit a Law Firm Self-Report within one month of his firm’s year end;
    3) Annually submit an Accounting Upload to the LSA**.**

12. Mr. Damm accepted the trust safety conditions by an endorsement on that letter dated April 7, 2017.

13. Mr. Damm initially hired a bookkeeper in 2017 but let her go after it became apparent that she was unable to perform the work required. He did not hire another bookkeeper, despite stating in his 2017 Accountant’s Report that a bookkeeper would be hired in 2018 to track QuickBooks and CLIO transactions. While he did hire an accountant to

complete his Start Up Report and Accountant's Report for 2017, he only consulted with his accountant in 2018 but not thereafter. Accordingly, he was in breach of condition 1 that required him to hire qualified accounting staff.

14. Mr. Damm failed to use PCLaw software to record his law firm trust and general transactions and complete monthly reconciliations, in breach of condition 2 above. While he obtained the CLIO software instead of PCLaw, with the permission of Trust Safety, he used it only for billing purposes and to record his trust and general account transactions, but not to complete monthly reconciliations as required. Instead, he completed monthly reconciliations manually by hand.

15. Mr. Damm's Self-Report and Accounting Upload for 2017 were due on March 31, 2018. In lieu of the Accounting Upload, he submitted an Accountant's Report prepared by his accountant. This Report was submitted late, on July 5, 2018. This was in breach of condition 3 above that required him to submit an Accounting Upload electronically to the LSA within one month of the designated filing date.

16. Upon receipt of the Accountant's Report, Trust Safety notified Mr. Damm that his subsequent year-end reporting had to be submitted electronically in the form of an Accounting Upload using the approved software.

17. In 2019, Mr. Damm sent a manual trust transaction list and client ledgers in lieu of an Accounting Upload. Trust Safety did not specifically notify him at the time that he was required to submit an electronic Accounting Upload instead.

18. On June 29, 2020, Mr. Damm, again submitted manual documents instead of an Accounting Upload for the year 2019.

19. On July 3, 2020, Mr. Damm was administratively suspended by Trust Safety for failing to submit his Accounting Upload. On July 24, 2020, Trust Safety revoked his Responsible Lawyer status and approval to operate a trust account.

20. In addition to not meeting the above conditions for operating a trust account, Mr. Damm failed to comply with Rule 119.30(5) by submitting manual documents instead of the required electronic Accounting Uploads for 2018 and 2019, even after being notified by Trust Safety in 2018 that Accounting Uploads would be required going forward.

21. Rule 119.30 of the Rules requires the following:

> 119.30(4) A law firm, if approved to operate a trust account, shall annually, by the due date:
>
> a) have the law firm's prescribed financial records reviewed by an accountant, and
> b) cause an Accountant's Report, in the form and the prescribed filing method approved by the Executive Director, to be completed by an accountant and filed with the Executive Director by the accountant responsible for the review.
>
> (5) A law firm is not required to comply with subrule (4) if:
>
> a) the law firm uses approved accounting software, and

b) annually, the law firm submits the law firm's trust account(s) data electronically, as an Electronic Data Upload, to the Executive Director by the due date.

22. In response to the complaint, Mr. Damm acknowledged that he "failed to stick to the letter of the Rules" and admitted that he "was negligent in his mistaken belief that he was fully in compliance with the Rules." However, he noted that he was under the impression that he was in compliance with the Rules by completing his trust accounting manually, as he was not advised otherwise by Trust Safety until July 2020.

23. While Mr. Damm initially asserted that he was not advised of his non-compliance, Trust Safety clearly advised him in the March 29, 2017, letter approving his trust account that he was required to submit his Trust Safety Accounting Upload electronically within one month of his filing date and thereafter, submit his Trust Safety Accounting Upload annually. Further, after he submitted an Accountant's Report in lieu of the Accounting Upload for the year 2017, Trust Safety notified him that his subsequent year-end reporting had to be submitted electronically in the form of an Accounting Upload using his approved software. Accordingly, he acknowledged that he was advised of the reporting requirements.

24. Mr. Damm admits that he failed to comply with the condition and reporting requirements for operating a trust account and that such conduct is deserving of sanction.

Citation 2: It is alleged Mark Garnett Damm failed to comply with Rule 119.19(4) by paying personal bills directly from his trust account

25. Rule 119.19(4) of the Rules directs that a trust account must be used only for the deposit and retention of trust money received by the law firm and not as a general account for the law firm, except in certain enumerated situations.

26. Mr. Damm breached Rule 119.19(4) by making online banking payments to pay personal bills directly from his trust account. Upon review of the banking records for his trust account, the following bill payments were identified:

    1) December 2, 2019: Online banking payment of $305.00 made to Telus Mobility
    2) December 10, 2019: Online banking Interac purchase of $220.50 made to the LSA
    3) December 10, 2019: Online banking Interac purchase of $1,990.80 made to Alberta Lawyers Indemnity Association

27. These payments were also in breach of Rule 119.21(4), which provides that money may only be withdrawn from a trust account in accordance with certain conditions. With respect to payments from trust to reimburse for billing, Rule 119.21(4)(a) states that money may be paid from the trust account to the law firm to reimburse for billing. Mr. Damm agreed that funds owed to the firm must first be transferred to the general account before making use of those funds.

28. Mr. Damm acknowledged making online banking payments directly from trust for personal matters but indicate that all funds were owed to him in fees. Mr. Damm asserted that he never took fees before completing the work on any matter.

29. Regardless of whether Mr. Damm had earned the funds withdrawn, he acknowledges and agrees that the Rules did not permit him to pay bills directly from his trust account. He ought to have first transferred the amount owing to himself from the trust account to his general account, after having completed a billing and delivered it to his clients, before paying the bills from his general account. He states that there was no malfeasance intended by his breach of the relevant rules.

30. Mr. Damm admits that he failed to comply with Rule 119.19(4) by paying personal bills directly from his trust account and that such conduct is deserving of sanction.

Citation 3: It is alleged Mark Garnett Damm failed to comply with Rule 119.21by withdrawing money from his trust account for fees and disbursements prior to delivering a Statement of Account to his clients

31. Rule 119.21 of the Rules states:

> 119.21(3) Money must not be withdrawn from a trust account unless:
> …
> b. the money is properly required for payment of a billing for fees or disbursements, but only
> if the withdrawal is made in compliance with subrule (2),
> …
> (4) Money may be withdrawn from a trust account of a law firm pursuant to subrule 3(b), if not held for a designated purpose, only in accordance with the following conditions:
>
> a) money may be paid from the trust account to the law firm to reimburse the firm for a disbursement made by it if the law firm has prepared a billing respecting the disbursement and either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal;
> b) money may be paid from the trust account to the law firm to pay for the law firm's fees for services if the law firm has prepared a billing for the services, the billing relates to services actually provided and is not based on an estimate of the services, **and the firm either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal** [emphasis added]**.**

32. Mr. Damm's trust account ledger for his clients shows multiple withdrawals for payments on account and transfers to his professional corporation in amounts ranging from $20 - $800 during the period of February 28 to April 28, 2020.

33. While he prepared Statements of Account prior to making the withdrawals, Mr. Damm did not deliver copies of these accounts to his clients either before or concurrently with the withdrawals.

34. Mr. Damm's client file contains two Statements of Account for the client's sale and purchase transactions dated February 28, 2020 and March 13, 2020, totaling $2,384.55 and $5,470.29, respectively.

35. As of September 4, 2020, the clients had not received invoices from Mr. Damm for their sale and purchase transactions.

36. In his interview with the LSA, Mr. Damm acknowledged not sending the invoices to A.R. and M.R.. He indicated that the invoices were not sent to A.R. and M.R. because he was waiting for the discharge so that he could prepare the final reporting to send out with the accounts. Mr. Damm further acknowledged that the invoices were more than the fees originally quoted to A.R. and M.R. ($2,200.00) as the transactions required significantly more time to complete than originally anticipated.

37. According to Mr. Damm it has been his practice to withdraw portions of his earned fees out of trust as needed, rather than first transferring the full amounts to his general account. He realized this was wrong but did so in part to keep enough funds in trust and because he was having some technical issues with making payments out of his general account. Once again, Mr. Damm reiterated that there was no malfeasance intended by his breach of the relevant rules.

38. Mr. Damm admits that he failed to comply with Rule 119.21 by withdrawing money from his trust account for fees and disbursements prior to delivering a Statement of Account to his clients and that such conduct is deserving of sanction.

Citation 4: It is alleged Mark Garnett Damm failed to comply with Rule 119.22(1) by making withdrawals from his trust account using an ATM

39. Upon review of his trust reconciliations and banking records, the Trust Safety department discovered multiple instances in which Mr. Damm withdrew money from trust using an ATM, which was fully disclosed by him in such trust reconciliations and banking records. At no time did he ever attempt to hide or “cover up” any of his accounting or trust dealings from the LSA or, in particular, the Trust Safety department or the LSA investigator.

40. Rule 119.22(1) requires that trust money be withdrawn by consecutively numbered cheques, except in certain enumerated instances where withdrawals by electronic banking, bank drafts or money orders are permitted. Mr. Damm acknowledged that **there** is no exception for making withdrawals using an ATM.

41. While Rule 119.45(1) allows for the deposit of trust and general receipts into ATMs subject to certain conditions, the ATM cards must be restricted to deposit only.

42. In his interview with the LSA investigator, Mr. Damm admitted that he had been withdrawing funds from trust by ATM since 2017. He noted that he was aware that all ATM transactions were recorded on the bank statements and as such, he was not trying to conceal the withdrawals. He now realizes that using an ATM card to make withdrawals from the trust account is contrary to the Rules.

43. Mr. Damm admitted that he failed to comply with Rule 119.22(1) by making withdrawals from his trust account using an ATM and that such conduct is deserving of sanction.

Citation 5: It is alleged Mark Garnett Damm failed to comply with Rule 119.24(3) by failing to report a trust account shortage to the Law Society.

44. Upon review of Mr. Damm's trust accounting records, the Trust Safety department noticed a shortage in his trust account pertaining to S.V. in the amount of $2,730.00.

45. During his LSA interview, Mr. Damm acknowledged that he had a shortage of $2,730.00 in the S.V. trust account in March 2020. He noted that the shortage was caused by an error while transferring fees using Interac, which caused inadvertent duplication. When the shortage was discovered, he corrected the shortage by depositing $3,000.00. However, he did not report the shortage to the LSA.

46. While he corrected the shortage, he was still required to report the shortage to the LSA pursuant to Rule 119.24(3)(b), which provides:

> 119.24(3) If a responsible lawyer becomes aware of a deficiency in a client's ledger account, the responsible lawyer is required to immediately notify the Executive Director of the deficiency in the form and prescribed filing method designated by the Executive Director and provide any relevant information regarding the reason for the deficiency if
>
> a) the law firm does not correct the deficiency within 7 days of the time the shortage arose, or
> b) the deficiency is an amount greater than $2500, regardless of when the deficiency is corrected.

47. Mr. Damm did not realize that he had to report the shortage.

48. Mr. Damm admitted that he failed to comply with Rule 119.24(3) by failing to report a trust account shortage to the LSA and that such conduct is deserving of sanction.

Citation 6: It is alleged Mark Garnett Damm failed to comply with Rule 119.30 by failing to submit his annual Law Firm Self-Report and Electronic Data Upload by the due date.

49. Rule 119.30 of the Rules requires:

> 119.30 (3) A law firm, shall annually
>
> a) by the Due Date, provide to the Executive Director a completed Law Firm Self-Report using the form and prescribed filing method approved by the Executive Director,
>
> (4) A law firm, if approved to operate a trust account, shall annually, by the due date,
>
> a. have the law firm's prescribed financial records reviewed by an accountant, and
> b. cause an Accountant's Report, in the form and the prescribed filing method
> approved by the Executive Director, to be completed by an accountant and filed with the Executive Director by the accountant responsible for the review.
>
> (5) A law firm is not required to comply with subrule (4) if
>
> a) the law firm uses approved accounting software, and

b) annually, the law firm submits the law firm's trust account(s) data electronically, as an Electronic Data Upload, to the Executive Director by the due date.

50. Mr. Damm's 2017 Self-Report and Accounting Upload were due on March 31, 2018. He submitted the Self-Report late, on June 29, 2018. In lieu of the Accounting Upload, he submitted an Accountant's Report, which was submitted late, on July 5, 2018.

51. Mr. Damm's 2018 Self-Report and Accounting Upload were due on March 31, 2019. He submitted the Self-Report late, on June 25, 2019. Instead of an Accounting Upload, he sent a manual trust transaction list and client ledgers. This report was also submitted late, on June 25, 2019.

52. Mr. Damm's 2019 Self-Report and Accounting Upload were due on April 30, 2020. He again submitted the Self-Report late, on June 29, 2020, and submitted manual documents instead of an Accounting Upload.

53. Mr. Damm acknowledged that he was late in submitting his Self-Report and manual documents in lieu of his Accounting Uploads in 2018, 2019 and 2020. He did submit the same prior to administratively being suspended for doing so – which date would have been by July 1st of each year.

54. Mr. Damm admitted that he failed to comply with Rule 119.30 by failing to submit his annual Law Firm Self-Report and Electronic Data Upload by the due dates and that such conduct is deserving of sanction.

Citation 7: It is alleged Mark Garnett Damm failed to comply with Rule 119.30 by failing to submit his annual Law Firm Self-Report and Electronic Data Upload by the due date.

55. Rule 119.36(4)(d) requires a law firm to prepare monthly reconciliations of its trust account. The Rule states:

> 119.36 (4) The financial records for trust money shall consist of at least the following:
> d) a comparison prepared within 1 month of the last day of each month, between the total of the trust accounts of the law firm and the total of all unexpended trust balances as per the trust ledger accounts, together with the reasons for and steps taken to correct any differences, supported by
> i. a detailed bank reconciliation including the disclosure of the balance per bank account, deposits in transit, outstanding cheques itemized by date, cheque number, payee and amount and any other items necessary for the reconciliation which would be fully detailed and explained, and
> ii. a detailed listing made monthly by trust account showing the unexpended balance of money in each trust ledger account;

56. While Mr. Damm completed monthly reconciliations manually, the reconciliations were not done in compliance with Rule 119.36(4)(d). In particular, the reconciliations that he did and provided did not include a client listing showing the balance for each client trust ledger account. Mr. Damm used only a bank statement to complete his reconciliations and did not verify the statement against the total balance of the client ledger accounts.

57. In his interview, Mr. Damm stated that he did complete monthly reconciliations manually by hand on his bank statements. He thought he was doing the reconciliations properly, but now understood that the reconciliations should balance with the bank accounts and ledgers.

58. Mr. Damm understands that the object of the monthly reconciliations is to ensure that the trust assets, as demonstrated by the bank statement, are equal to the trust liabilities, as demonstrated by the client listing showing the balance in each trust ledger account. By only using his bank statements, he was not properly comparing his trust account assets to liabilities, and thus was not properly completing my reconciliations.

59. Mr. Damm admits that he failed to comply with Rule 119.36(4)(d) by failing to properly conduct and maintain monthly bank reconciliations of my trust account and that such conduct is deserving of sanction.

Citation 8: It is alleged Mark Garnett Damm failed to be honest and candid with his clients, A.R. and M.R.

60. On February 28, 2020, A.R. and M.R. retained Mr. Damm in relation to the sale of their home and the purchase of a new home.

61. The purchase transaction closed on March 13, 2020. Mr. Damm was directed to hold back $65,175.00 in loan funds until the lender, MCAP, authorized release of the funds.

62. Mr. Damm asserted that he prepared a cheque for $65,175.00 on June 30, 2020, with the intention of mailing it to A.R. and M.R. while he was on vacation in B.C., pending the authorized release by MCAP, which was anticipated to be received while he was on vacation.

63. On July 30, 2020, MCAP emailed Mr. Damm authorizing the release of the hold back funds.

64. On August 10, 2020, A.R. texted Mr. Damm regarding the hold back funds. She texted him again the following day, asking for a timeline for the payment of the funds. Mr. Damm responded by text indicating that he had sent the cheque by mail.

65. On August 17, 2020, A.R. texted Mr. Damm that they had not received the cheque. Mr. Damm responded that he should not have sent the cheque from B.C. and blamed the delay on the mail. He indicated that he would e-transfer the funds if the cheque did not arrive by that Wednesday.

66. Mr. Damm was administratively suspended as of July 3, 2020, and his trust account was frozen as of July 24, 2020. Accordingly, he was not able to send A.R. an e-transfer.

67. Between August 19 and 24, 2020, A.R. texted, emailed and called him to advise that the cheque had not arrived. On August 24, 2020, Mr. Damm replied that the missing cheque was a problem and that he would have to get directions from the LSA. In subsequent emails, Mr. Damm advised A.R. that he had called the LSA and expected a response back. Mr. Damm then told her that he followed up with the LSA by email and phone. On August 28, 2020, Mr. Damm wrote the following:

> I did hear back from the Law Society. I have to complete some paperwork, and they are then going to advise me, most likely on Friday (today), as to how I should get the funds to you. Once they've confirmed that, I'll be able to get the funds to you.

68. A.R. followed up with Mr. Damm again on August 31, 2020, asking how he made out with the LSA. He replied:

> I've submitted all of the necessary paperwork and anticipate being able to deliver a replacement cheque to you within the next three days, finally!

69. Mr. Damm did not contact the LSA regarding the missing cheque.

70. On August 28, 2020, A.R. contacted the LSA herself regarding her concerns about the missing cheque and lack of response from Mr. Damm.

71. On September 4, 2020, Trust Safety gave Mr. Damm permission to release the hold back funds to A.R. prior to closing his trust account.

72. Section 3.2-3 of the Code of Conduct (Code) provides as follows:

> 3.2-3 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

73. Mr. Damm failed to be honest and candid with the A.R. and M.R. by not advising them that his trust account was frozen and accordingly, he was unable to issue the hold back funds to them. He also misled A.R. by telling her that he had contacted the LSA regarding the missing cheque and was waiting to hear back when he had not done so. Further, he did not advise A.R. and M.R. that he was administratively suspended and as such, he was not able to work on their file.

74. Mr. Damm in his interview with the LSA investigator, agreed that he was not completely candid with A.R. about his ability to release the funds. He further admitted that while he told her he was talking to the LSA about how to address the missing cheque, he did not actually speak with anyone at the LSA until contacted by the investigator.

75. According to Mr. Damm during the subject period of time when dealing with the A.R. and M.R. file, had experienced a traumatic and life-threatening accident that resulted in his hospitalization for eleven days in May, 2020. Thereafter, he was in a significant degree of pain and rehabilitation for several months and during the entire period of his dealings with A.R. and M.R.

76. Mr. Damm was suffering from stress and health issues due to his lack of mobility in recovering from my accident, which was proliferated by the social isolation from his peer group due to the early days of the Covid-19 pandemic.

77. Mr. Damm states that he was also dealing with his mother's health which further exacerbated his own health issues.

78. Mr. Damm admitted that he failed to be honest and candid with his clients, A.R. and M.R., and that such conduct is deserving of sanction.

Citation 9: It is alleged Mark Garnett Damm practiced while administratively suspended

79. Mr. Damm was administratively suspended on July 3, 2020 for failing to submit his Accounting Upload. He remained suspended until September 29, 2020, when he was reinstated to active/practicing status.

80. During the period he was suspended, Mr. Damm did the following work on the A.R. and M.R. file:

1) He took instructions from MCAP regarding the release of the holdback funds held in his trust account on July 30, 2020;
2) He attempted to release trust funds by sending a cheque to A.R. and M.R., which he subsequently indicated was delayed due to issues with the mail;
3) He repeatedly corresponded with A.R. and M.R. regarding their matter from July 30 to September 4, 2020, by text and email;
4) He telephoned opposing counsel's office on or about July 29, 2020 and left a voicemail, then subsequently had a conversation with an assistant at that office regarding the mortgage discharge;
5) He corresponded by email with an assistant at opposing counsel's office regarding the mortgage discharge.

81. Sections 106 and 107 of the *Act* state:

> 106(1) No person shall, unless the person is an active member of the Society
> a) practice as a barrister or as a solicitor
> 107(4) A member whose membership is under suspension shall not hold out or represent that the member is a member in good standing or a member not under suspension.

82. Mr. Damm breached section 106(1)(a) of the *Act* by continuing to practice despite being administratively suspended. He acknowledged that all of the above-described work done on the A.R. and M.R. file constitutes practicing as a barrister or solicitor.

83. In addition, he breached section 107(4) of the *Act* by holding himself out as a lawyer in good standing and not under suspension with the LSA. As an example, in an email sent to opposing counsel's office on September 4, 2020 regarding the Discharge of Mortgage, Mr. Damm's signature reads, "Mark G. Damm, J.D. Barrister and Solicitor". This same signature was repeatedly used by himself in his emails to A.R. during his suspension.

84. Mr. Damm acknowledged that he did not advise A.R. of his suspension.

85. Mr. Damm stated that never intended to deceive, to fail to be honest or candid with his clients or other counsel, to break the subject Rules, or to practice while administratively suspended. He did so during a time period when he was not either physically or mentally capable of carrying on his practice. The health issues he was suffering from have been resolved and are no longer a concern. Mr. Damm stated that he has always cooperated fully with Membership Services, the LSA investigator, Trust Safety, Practice

Management and the LSA in general in addressing this matter and the issues which have arisen as a result of his conduct during the relevant time period. He stated that he continues to work actively with Practice Management to ensure full ongoing compliance with the Rules.

86. Mr. Damm admitted that he practiced while administratively suspended and that such conduct is deserving of sanction.

Additional Submissions Regarding Citations

87. In addition to the Agreed Facts, LSA counsel submitted that Mr. Damm had been extremely cooperative. LSA counsel stated that Mr. Damm admitted guilt to all the citations and described that the majority of the citations are trust account related, the remaining issues being dealing with respect to clients that were over a brief period of time and deal with very narrow issues, and for practicing while suspended.

88. Mr. Damm admitted the citations and stated that he was embarrassed, remorseful that he did not live up to his obligations under the Code and that this was a low point in this life both personally and professionally. He reiterated that he was fully cooperative with the LSA and that he plans to continue to work with Practice Management. Mr. Damm further mentioned that he plans to focus his legal practice on the preparation of wills and estates, estate planning, and probate of estates.

Analysis and Decision on Merits

89. As with all administrative hearings, unless otherwise specified by a statute, the standard of proof is on the balance of probabilities as set out in *F.H v McDougall,* 2008 SCC 53. The standard of proof on the balance of probabilities was recently confirmed by the Alberta Court of Appeal in *Moll v College of Alberta of Psychologists,* 2011 ABCA 110. The Court noted the law is now clear that there is one civil standard of proof in common law, that is the proof on a balance of probabilities.

90. For an admission of guilt to be acceptable, the admission must have the following four elements (Four Elements):

    1) The admission must be made voluntarily and free of undue coercion;
    2) The lawyer must unequivocally admit guilt to the essential elements of the citations;
    3) The lawyer must understand the nature and consequences of the admission; and
    4) The lawyer must understand that the hearing committee is not bound by any submission advanced jointly by the lawyer and LSA.

91. The Committee accepted the Agreed Facts as being in the appropriate form pursuant to section 60 of the *Act.* It is noted that the Four Elements were in the Agreed Facts that Mr. Damm consented to and were admitted. The panel also once again asked Mr. Damm if he accepted and understood these Four Elements prior to rendering its decision, which he confirmed he did. Since the admissions in the Agreed Facts and subsequently in this hearing were accepted, along with submissions provided by LSA

counsel and Mr. Damm, each admission was deemed to be a finding of this Committee that Mr. Damm's conduct was conduct deserving of sanction.

Submissions on Sanction

92. The parties presented a joint submission on sanction of a six-week suspension, commencing on August 1, 2023. The parties also jointly submitted that Mr. Damm's costs be capped at $12,000.00 (actual costs being $15,259.75). With the suspension start date of August 1, 2023, Mr. Damm will not need a custodian as he would be able to arrange his affairs prior to the suspension.

93. LSA counsel pointed to Mr. Damm's previous record from 2009 resulting in a reprimand and costs. LSA counsel further added that Mr. Damm identified his issues, worked cooperatively with the LSA, and will be working with practice management on an ongoing basis. He apologized and was remorseful. He remedied his trust accounting shortfall quickly. LSA counsel submitted that we need to be cognizant of the integrity of the profession and reputation of the profession. This would include that Mr. Damm had nine citations, with seven of them being trust account citations, and the remaining two being failing to be candid with his clients and practicing while administratively suspended. LSA counsel added that these do touch integrity, especially with regards to being candid with his clients; however, they did not have any governability issues. For his failure to be candid with his clients, Mr. Damm seemed to be at least in his thoughts trying to do right by his clients, just not in the proper form. LSA counsel submitted that Mr. Damm's conduct was serious enough to be larger than simple reprimand. Additionally, the Committee will take into consideration that Mr. Damm was dealing with personal, family and health issues at the time the conduct occurred.

94. LSA counsel cited *Law Society of Alberta v. Mason*, 2022 ABLS 2, and *Law Society of Alberta v. Vanderleek,* 2014 ABLS 19 as relevant authorities, along with other cases with less similar facts. Both *Mason and Vanderleek* had facts somewhat similar to Mr. Damm, less citations with seven and three respectively, and the member was ordered suspended for one month. It is worth noting in *Vanderleek* there were governability issues unlike Mr. Damm, and less severe trust violations. LSA counsel argued that these cases, in particular *Mason,* point towards an appropriate minimum to be one-month suspension on similar cases. LSA counsel pointed out however that Mr. Damm has nine citations, along with Mr. Damm's previous record, so more than a one-month suspension is appropriate, which would be the six-weeks suspension.

Analysis and Decision on Sanction

95. While a hearing committee is not bound to accept joint submissions as to sanction, such submissions carry significant weight. The case authorities indicate that they should be accepted unless they are demonstrably unfit and contrary to the public interest. In *Law Society of Alberta v. Llewellyn*, 2018 ABLS 11, for example, the hearing committee described this as a "high standard" (paragraph 11). That hearing committee also noted (paragraph 10):

> The Committee is not bound by joint submissions on sanctions. However, the Committee is required to give serious consideration to jointly tendered submissions, and accept, unless they are found to be unfit, unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting the joint submissions.

96. This is consistent with the leading authority, *R. v. Anthony-Cook*, 2016 SCC 43, in which the Supreme Court of Canada held that a joint submission should be accepted unless the proposed sanction "would bring the administration of justice into disrepute or is otherwise contrary to the public interest" (paragraph 32). *Anthony-Cook* is a criminal law case, but it has been applied in other LSA conduct matters.

97. According to paragraph 185 of the LSA Pre-Hearing and Hearing Guideline, June 3, 2022 (Guideline), “[t]he fundamental purposes of sanctioning are to ensure the public is protected from acts of professional misconduct and to protect the public's confidence in the integrity of the legal profession". The Guideline sets out a number of factors that may be taken into account when determining sanction, including, among others, the goals of specific and general deterrence and denunciation of the misconduct (paragraph 186).

98. Paragraph 198 of the Guideline indicates that "[t]he prime determinant of the appropriate sanction is the seriousness of the misconduct". It then suggests that in determining the seriousness of the misconduct, a hearing committee may consider a list of nine factors, including the degree to which the misconduct constitutes a risk to the public or to the reputation of the legal profession, the harm or potential harm caused by the misconduct, the number of incidents involved, and the length of time involved.

99. Paragraph 204 of the Guideline indicates that a hearing committee may also consider additional factors that have either an aggravating or mitigating effect on the appropriate sanction. These may include whether the lawyer has a prior discipline record, whether the lawyer acknowledged their wrongdoing, any expression of remorse, the lawyer's level of cooperation with the LSA's conduct process, whether restitution has been made, and the extent to which the lawyer benefited from the misconduct.

100. In *Anthony-Cook,* the Supreme Court of Canada made it clear that “a joint submission should not be rejected lightly.” This is because (paragraph 34):

> “Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.”

101. The Committee was satisfied that the joint submission was an appropriate negotiated resolution in the circumstances of this case.

102. In *Mason,* at paragraphs 43 and 44, that hearing committee stated:

> “That said, the Committee considers problems operating trust accounts to be serious conduct. The public relies on lawyers to handle trust property with the

> utmost care and concern, and matters such as this run the risk of negatively affecting the public's confidence in the legal profession. While there was no harm to clients or the public, there could have been. Moreover, the Committee was concerned with the fact that [the Member] did not report the problems at his earliest opportunity.
>
> However, the Committee was satisfied that [the Member] does not represent an ongoing threat to the public, and that there is little chance of recurrence. He took the matter and these proceedings seriously, cooperated throughout, and accepted responsibility for what occurred – including by repaying the shortage and implementing improved accounting practices. “

103. The issues in *Mason* are similar and relevant to Mr. Damm. It is noted that Mr. Damm will be continuing to work with Practice Management.

104. Based on the authorities it reviewed, the Committee is of the view that the low-end of the range for similar cases is a one-month suspension. Accordingly, the Committee was satisfied that the joint submission on sanction is proportionate to the circumstances and comparable to prior decisions, and sufficient to affect the necessary specific and general deterrence.

105. As indicated, the Committee accepted the joint submission on sanction and jointly proposed costs order. Accordingly, pursuant to section 72 of the *Act,* the Committee orders:

    1) Mr. Damm to be suspended for six weeks commencing on August 1, 2023; and
    2) Mr. Damm shall pay the LSA $12,000.00 in costs by February 1, 2025.

Concluding Matters

106. A Notice to the Profession shall be issued, as required by section 85 of the *Act* in circumstances of a suspension.

107. There will be no referral to the Attorney General.

108. 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. Damm will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated August 11, 2023

Sanjiv Parmar - Chair

Barbara McKinley

Anthony Young, KC