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 DAVID KOBYLNYK
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee
Bud Melnyk, KC – Chair and Bencher
Levonne Louie – Lay Bencher
Sanjiv Parmar, KC – Bencher

Appearances
Shane Sackman – Counsel for the Law Society of Alberta (LSA)
David Kobylnyk – Self-represented

Sanction Hearing Dates
June 11, 2024
August 12, 2024

Hearing Location
Virtual Hearing

HEARING COMMITTEE REPORT – SANCTION PHASE

Overview

1. On March 8 and April 4, 2023 this Hearing Committee (Committee) conducted the merits phase of a hearing into the conduct of David Kobylnyk. For the reasons set out in its decision dated August 30, 2023 (Merits Decision[1]), the Committee found Mr. Kobylnyk guilty of conduct deserving of sanction on several citations. This Committee reconvened on June 11 and August 12, 2024, pursuant to section 59(1)(b) of the *Legal Profession Act* (*Act*), to hear evidence and arguments regarding the appropriate sanction against Mr. Kobylnyk.

2. After reviewing all of the evidence and exhibits and hearing the testimony and arguments of the LSA and Mr. Kobylnyk, for the reasons set out below, the Committee finds that, based on the facts of this case, the appropriate sanction is a 15-month suspension to take effect August 12, 2024.

[1] *Law Society of Alberta v. Kobylnyk,* 2023 CanLI I86095 (ABLS).

Findings on Guilt

3. The Committee found Mr. Kobylnyk guilty of conduct deserving sanction on citations 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, and not guilty on citation 4. The facts related to the sanctionable conduct are set out in the Merits Decision. This phase of this hearing is to consider the appropriate sanction for that conduct. In brief the specific findings of misconduct are set out as follows:

Complaint 1

4. On at least two separate occasions Mr. Kobylnyk failed to respond to another lawyer, and in one instance this delay was for a period of six months and in a second instance by almost three months. Consequently, Mr. Kobylnyk was found guilty of failing to respond in a timely manner to communications from another lawyer (citation 1).

5. Between November 20, 2017 and March 29, 2017, some four months, the LSA attempted to contact Mr. Kobylnyk through emails, voicemails and personal attendances at his office for a response to this Complaint. Mr. Kobylnyk failed to respond appropriately, and this Committee found Mr. Kobylnyk guilty of failing to promptly respond to and cooperate with the LSA (citation 2).

6. A hearing committee on May 6, 2019, imposed an undertaking on Mr. Kobylnyk "to promptly respond to and cooperate with the LSA and undertake to do so." Mr. Kobylnyk was found guilty of breaching this undertaking (citation 3).

Complaint 2

7. Mr. Kobylnyk was retained by ASL on March 16, 2018. As of January 25, 2019, Mr. Kobylnyk had not filed anything with the Courts. Mr. Kobylnyk had not taken any active steps in accordance with the client instructions for some ten months and all the while Mr. Kobylnyk was advising the client that he had in fact had the defendant personally served and that he would be noting that defendant in default. This was clearly not true and as such Mr. Kobylnyk was found guilty of failing to serve his client (citation 5).

8. On February 12, 2019 and March 8, 2019, letters were emailed to Mr. Kobylnyk seeking a response to Complaint 2. On April 17, 2019, Conduct Counsel hand delivered a letter to Mr. Kobylnyk requesting a response to all of Complaints 1, 2 and 3, and requesting a response by May 3, 2019. On May 6, 2019, Mr. Kobylnyk sent an email saying that he was willing to "fully cooperate with you and the Law Society regarding" these complaints. Despite this assertion, Mr. Kobylnyk never provided a response and as such Mr. Kobylnyk was found guilty of failing to promptly respond to and cooperate with the LSA (citation 6).

9. In view of these failures, the Committee also found Mr. Kobylnyk guilty of breaching his previously noted undertaking to promptly respond to and cooperate with the LSA (citation 7).

Complaint 3

10. Mr. Kobylnyk failed to pay an outstanding invoice for Court Reporting services and accordingly he was found guilty of not promptly meeting financial obligations in relation to his practice (citation 8).

11. Over a period of some six months, the Court Reporter made several of requests for payment of the Court Reporting invoice, to which Mr. Kobylnyk did not respond. This Committee therefore found Mr. Kobylnyk guilty of failing to respond in a timely manner to communications from another professional (citation 9).

12. The LSA made numerous attempts asking Mr. Kobylnyk to respond to Complaints 1, 2 and 3, to which he did not respond. As such Mr. Kobylnyk was found guilty of failing to promptly respond to and cooperate with the LSA (citation 10).

13. In view of the finding of failing to respond and cooperate, we further found Mr. Kobylnyk guilty of breaching his undertaking to promptly respond to and cooperate with the LSA (citation 11).

Complaint 4

14. Over a two-and-a-half-year period a client emailed Mr. Kobylnyk on eight separate occasions seeking an update on the client's claim. At no time did Mr. Kobylnyk respond to these email requests and accordingly the Committee found Mr. Kobylnyk guilty of failing to serve his client, J.G (citation 12).

15. Mr. Kobylnyk's client, J.G., forwarded investment funds to a company that was controlled by D.C., who then in turn forwarded these monies on to a third-party property development company. D.C. was also a client of Mr. Kobylnyk, but this was not disclosed to J.G. Mr. Kobylnyk subsequently acted on behalf of J.G. in an action against third party defendants arising from the loss of the investment. Accordingly, Mr. Kobylnyk was found guilty of acting while in a conflict or potential conflict of interest without obtaining the consent of his client, J.G (citation 13).

16. An application to dismiss for long delay was brought by the defendants in the J.G. action. At no time did Mr. Kobylnyk advise his client, J.G. of this application and nor did he attend at the application. Mr. Kobylnyk filed an application to set aside the Order dismissing the action, but again Mr. Kobylnyk failed to advise his client of this application. Accordingly, Mr. Kobylnyk was found guilty of failing to obtain instructions

from his client, J.G., on all matters not falling within his express or implied authority (citation 14).

17. The client, J.G., was advised by Mr. Kobylnyk that the defendants were disputing the Affidavit of Records and Mr. Kobylnyk was instructed to apply for summary judgment. Mr. Kobylnyk never in fact made this summary judgment application and he therefore failed to be candid with his client, J.G (citation 15).

18. On three separate occasions, over seven-plus months, the LSA sought a response from Mr. Kobylnyk in response to Complaint 4. Mr. Kobylnyk did not reply, and he was thus found guilty of failing to promptly respond to and cooperate with the LSA (citation 16).

19. In view of this failure to respond to the LSA on Complaint 4, Mr. Kobylnyk was again found guilty of breaching his undertaking to promptly respond to and cooperate with the LSA (citation 17).

Complaint 5

20. Mr. Kobylnyk failed to notify the LSA that Writs of Enforcement had been issued against him personally, which was a breach of Rule 119.34 of the Rules of the LSA (Rules) (citation 18).

21. The LSA made three requests for a response to Complaint 5, and at no time did Mr. Kobylnyk respond. As such he was found guilty of failing to promptly respond to and cooperate with the LSA (citation 19).

22. Mr. Kobylnyk was again found guilty of breaching an undertaking to promptly respond to and cooperate with the LSA (citation 20).

Complaint 6

23. Mr. Kobylnyk failed again to pay another Court Reporter, and he was therefore found guilty of failing to promptly meet financial obligations in relation to his practice (citation 21).

Preliminary Matters

24. As noted in the Merits Decision, there were no objections to the constitution of the Committee, or its jurisdiction and a public hearing proceeded. No objections or private hearing applications were made during this sanction phase, so the sanction hearing continued in public.

25. Mr. Kobylnyk sought a correction or corrigendum in respect of citation 13 and in particular Mr. Kobylnyk argued that the Committee misapprehended the facts and that

the Committee “fundamentally misunderstood the J.G. matter.” At issue was citation 13, which concerned the J.G. matter. That citation stated that Mr. Kobylnyk acted while in a conflict or potential conflict of interest without obtaining the consent of J.G., or in circumstances where it was not in the best interest of J.G. that he does so.

26. The evidence at the hearing, and as set out in the Notice to Admit Facts and Exhibits, was as follows:

a) On or about February 6, 2008 J.G. retained B.S.G. to perform a background check on B.A. since J.G. was contemplating investing with B.A. The task of carrying out this investigation of B.A. was assigned by B.S.G. to G.B., who then reported the results back to J.G. (Report).

b) Based on the Report dated February 13, 2008, J.G. proceeded to invest monies with a numbered company. D.C. was the sole director of that numbered company. On April 4, 2008 J.G. sent investment monies to the numbered company and this company in turn sent those funds to a real estate development company on April 7, 2008. The sole director of this real estate development company was B.A.

c) J.G. eventually lost the entirety of his investment. On December 16, 2010 Mr. Kobylnyk filed a Statement of Claim against B.S.G. and G.B. on behalf of J.G. alleging that the information in the Report was false and inaccurate in material respects.

d) D.C. was also a client of Mr. Kobylnyk. Mr. Kobylnyk’s client, J.G., had forwarded the investment funds to a company that was controlled by D.C., who then in turn forwarded these monies onto a third-party property development company.

e) Mr. Kobylnyk never advised J.G. of a potential conflict of interest with D.C. nor did he seek any instructions from J.G. relating to the same.

27. Mr. Kobylnyk raised two arguments:

a) Mr. Kobylnyk stated that D.C. was his client prior to J.G. being his client and that J.G. was called as a witness to testify on behalf of D.C. Since Mr. Kobylnyk had cross examined J.G., Mr. Kobylnyk argued that it would have been obvious to J.G. that D.C. was his client. As such, Mr. Kobylnyk asserts that J.G. knew that D.C. was his client.

b) It was also argued that it was an erroneous finding of fact that J.G. implicitly consented to Mr. Kobylnyk acting for D.C. since there was no consent for J.G. to

give in light of Mr. Kobylnyk already acting for D.C. for several years prior to J.G. filing a Statement of Claim.

28. At the time of hearing the application, the Committee rejected the application of Mr. Kobylnyk on the basis that if there was an error on the evidence before the Committee then Mr. Kobylnyk has a right of appeal. The Committee was not prepared to rehear the matter. The Committee would also further add in this written decision the following considerations in rejecting the application:

a) At the hearing, Mr. Kobylnyk made application to be relieved of the Notice to Admit Facts and Exhibits, which application was denied. In accordance with Rule 90.4(8) of the Rules, Mr. Kobylnyk was deemed to have admitted the truth of the facts and the authenticity of any documents. That Notice states that Mr. Kobylnyk never advised J.G. of a potential conflict of interest with D.C. nor did he seek any instructions from J.G. relating to the same.

b) J.G. may have been aware that Mr. Kobylnyk had previously acted for D.C. (though that evidence was not before this Committee at the hearing), that does not mean J.G. was aware of a potential conflict of interest arising from the role of D.C. in handling of investment funds.

c) During the hearing on April 4, 2023, the issue of the conflict of interest was raised starting at page 159 of the transcript where Mr. Kobylnyk was asked about this issue, but gave no direct answer or denial:

> Q: All right, thank you. There is some allegations about conflict of interest or potential conflict of interest. Do you have any comments regarding those?
>
> A: Yes. And that's what I mentioned – that's what I meant when there was this issue of [C.B.] bringing the application, and you know, where in the context of the issue where her application potentially placed me in a conflict of interest, that's why I reached out to the other counsel to handle it. And I did – as I recall, I spoke to a practice advisor about that and received those instructions to refer to another lawyer.

d) The Committee did not make a finding of fact that J.G. implicitly consented to Mr. Kobylnyk acting for D.C. On the contrary, the Committee stated the following, at paragraph 82 of the Merits Decision:

> From an objective point of view, it cannot be said that J.G. implicitly consented to Mr. Kobylnyk acting for D.C. and there is no evidence that J.G. was even aware that D.C. was also a client of Mr. Kobylnyk.

Personal Background

29. Mr. Kobylnyk was admitted as member of the LSA on February 11, 2000. Mr. Kobylnyk's practice included various types of matters, including civil litigation, real estate, matrimonial/family law and criminal law. Following his articles Mr. Kobylnyk worked as an associate at two firms for about five years, followed by one year as in-house counsel. In October 2008 Mr. Kobylnyk started his own firm as a sole practitioner.

30. Mr. Kobylnyk is currently a suspended lawyer.

LSA Submissions on Sanction

31. The LSA sought disbarment of Mr. Kobylnyk principally on the basis that Mr. Kobylnyk is ungovernable due to his lack of cooperation with the LSA. In particular, LSA counsel asserts that Mr. Kobylnyk has shown a repeated pattern of refusing to cooperate with the LSA and that this is more egregious given the fact that he was previously disciplined by a hearing committee in 2019[2] when he gave an undertaking to cooperate with the LSA.

32. LSA counsel notes that Mr. Kobylnyk was previously found guilty on May 6, 2019[3] on seven citations, including client service issues, failing to be candid with a client and failure to respond to the LSA. Mr. Kobylnyk was suspended for two months, referred to Practice Management and ordered to pay costs of $30,000.00. Though there is some timing overlap between the previous matter and the matter before this Committee, the LSA argues that the previous citations are similar and justify progressive discipline. In support of this position, the LSA refers to the Court of Appeal decision of *Peet v Law Society of Saskatchewan,* at paragraph 52:[4]

> Here, of course, Mr. Peet was the offending member in both matters. It is true he had committed the offence currently under review before he received the penalty for the earlier infraction, but it is also true he was blithely ignoring requests for a response form the Law Society at the same time his penalty was being considered for the earlier similar offence. At the very least, he had to know that this type of conduct would be aggravating. With his record of not just the one earlier, similar infraction, but having amassed a record of 16 other charges (10 of which are for the same offence as the behaviour under review), Mr. Peet simply cannot say that he has not had ample opportunity to learn from his past conduct or to endeavour to reform himself.

33. Counsel for the LSA further argues that the following are aggravating factors:

---

[2] *Law Society of Alberta v. Kobylnyk,* 2019 ABLS 19.
[3] Ibid.
[4] *Peet v. Law Society of Saskatchewan*, 2019 SKCA 49 at paragraph 52.

a) Mr. Kobylnyk has consistently refused to cooperate and respond in any meaningful manner with the LSA. Examples of non-cooperation included refusing to provide evidence of an alleged email outage, blaming a lack of email access post suspension despite exhibits showing that Mr. Kobylnyk had email access, accusing the LSA of mishandling or destroying records without any evidence of same and persistently making service of records difficult.

b) Mr. Kobylnyk failed to attend most of the Pre-Hearing Conferences and on one occasion when he did attend, he commented that the LSA was a "corrupt body" and that the process was unfair.

c) Mr. Kobylnyk admitted to failing to respond to the LSA and that he was "combative" and uncooperative.

d) Mr. Kobylnyk believes that the LSA is in a conspiracy against him and that they have singled him out as his reason for being unwilling to submit to regulation.

e) There are repeated breaches of an undertaking to the LSA to cooperate. The timing of these breaches is concerning since the undertaking was given May 6, 2019.

f) The failure to serve clients goes beyond mere inadvertence or sloppiness and includes elements of deceit and lack of candour. Mr. Kobylnyk advised a client, S.D., that he had taken litigation steps, which was not true, and only discovered by the client when she attended at the courthouse. Furthermore, this client had advised Mr. Kobylnyk to take certain legal steps, which is contrary to Mr. Kobylnyk's claim that he was told not to take such steps.

g) In respect of the J.G. matter, the client was not informed of a potential conflict of interest, that Mr. Kobylnyk failed to advise the client of a serious and potentially detrimental court application, that Mr. Kobylnyk was not candid with the client, that Mr. Kobylnyk failed to follow client instructions to seek summary judgment, that Mr. Kobylnyk failed to attend for a court application and that client communications were misleading about the legal jeopardy facing the client.

34. LSA counsel does note that Mr. Kobylnyk admitted to many of the citations, but that only occurred after a contested motion about the notice to admit and a history of non-cooperation. LSA counsel further argues that the admissions show a lack of remorse and understanding of the misconduct, which is evidenced by Mr. Kobylnyk deliberately refusing to respond to another lawyer by design, by Mr. Kobylnyk stating that the client whose claim was struck did not have much merit anyway and him further implying that citations relating to financial obligations were evidence of the LSA unfairly piling on rather than legitimate regulatory concerns.

35. LSA counsel notes that while Mr. Kobylnyk raised medical issues, there was no substantiation of those issues. As such, LSA counsel argues that these assertions should be accorded little mitigating weight.

36. LSA counsel emphasized the importance of a regulator being able to govern a member and in support of this principle, LSA counsel put forward the following cases:

> *Law Society of Alberta v Zilinski*[5]*:* In this case, the hearing committee noted that the "ability to govern the profession is essential" and that the failure of the member to "be candid and cooperate with the LSA raises serious concerns about his ability to be governed by the LSA." In this case the "failure to respond and cooperate were deliberate and conscious choices" by the member.
>
> *Law Society of Alberta v Thomas*[6]*:* In this case, the hearing committee confirmed that the usual punishment for a finding of ungovernability is disbarment.

37. LSA counsel submitted the following authorities which engaged concerns of ungovernability, without trust misappropriation or criminal convictions, as supporting a sanction of disbarment:

> *Law Society of Alberta v. Enge*[7]*:* In this case, the member was convicted of four citations relating to client service, charging excess fees, failure to cooperate and breach of trust conditions. The member was disbarred with the hearing committee noting that many of the citations did not warrant disbarment, but that the failure to cooperate dictated a sanction of disbarment.
>
> *Law Society of Alberta v. Virk*[8]*:* The member in this matter was found guilty on 14 citations relating to failures to serve clients, acting in a conflict of interest, acting with impropriety against other lawyers and failing to cooperate with the regulator. The member was disbarred, which was affirmed by a majority of an appeal panel.
>
> *Law Society of Alberta v. Clarence Ewasiuk*[9]*:* In this case, the member was found guilty of 20 citations relating to failures to reply to undertakings, failing to serve clients, misleading clients about the status of their matters and failure to cooperate with the regulator. The member had a disciplinary history of similar conduct. The member was disbarred owing to a lack of understanding of their ethical obligations and ungovernability.

[5] *Law Society of Alberta v. Zilinski*, 2017 ABLS 13.
[6] *Law Society of Alberta v. Thomas*, 2017 ABLS 21.
[7] *Law Society of Alberta v. Enge*, 2009 ABLS 36.
[8] *Law Society of Alberta v. Virk*, 2021 ABLS 16, affirmed 2022 ABCA 2.
[9] *Law Society of Alberta v. Clarence Ewasiuk*, 2012 ABLS 16.

Law Society of Alberta v. Peterson[10]*:* The member in this matter was convicted of two citations including failure to serve clients and failure to reply to the LSA. Mr. Peterson had a disciplinary record for similar misconduct. The member failed to attend at his hearing, even after the panel advised that they were considering a disbarment. The hearing committee found that a further suspension would serve no purpose and they disbarred Mr. Peterson.

Law Society of Upper Canada v Wickham[11]*:* In this matter, the member was convicted of 17 particulars arising out of four complaints, which generally related to failures to respond to the Law Society, failures to serve clients, failure to produce records, failure to reply to other lawyers and failing to account for money. The majority recommended a suspension, with the dissent seeking disbarment. The convocation of the full panel of benchers accepted the dissent recommendation and disbarred the member primarily because the evidence suggested serious governability concerns and a history of flippant or incomplete responses.

38. Finally, on the issue of costs, LSA counsel noted that the estimated costs covered the two hearing days and that the LSA was significantly successful. On this issue of a change of counsel, it was noted by LSA counsel that none of the time for the initial LSA lawyer was charged so that there was no overcharging for duplication by a second counsel taking over the matter.

Mr. Kobylnyk's Submissions on Sanction

39. Mr. Kobylnyk respectively acknowledged the findings of guilt and he stated that those "findings have weighed extremely heavily on me, and I have felt your condemnation of me."

40. Mr. Kobylnyk provided a lengthy and detailed personal history about his life experiences and values, which we would summarize as follows:

    a) Mr. Kobylnyk was born and raised on Calgary, Alberta. His father was a dentist, and his mother had a university degree in archaeology. His mother passed away when Mr. Kobylnyk was age eleven, and it was his father who played a significant role in raising Mr. Kobylnyk and his younger brother. Growing up, Mr. Kobylnyk spent a great deal of time with his paternal grandparents. It was his grandmother from whom he gained a passion for cooking and baking and his grandfather taught him to speak Ukrainian.

[10] *Law Society of Alberta v. Peterson*, 2022 ABLS 25.
[11] *Law Society of Upper Canada v. Wickham* [1994] LSDD No 155.

b) Mr. Kobylnyk was married July 1, 2000 and he and his wife have twin sons and a daughter. Their twin sons were actively involved in curling from a young age and well into their late teen years. Mr. Kobylnyk took on a coaching role. The young men won several bonspiels and Mr. Kobylnyk continued to improve his coaching designations. Their daughter is an avid reader and has dedicated herself to dancing, having competed in a number of events.

c) Mr. Kobylnyk took the French bilingual program starting in elementary school and he was academically very successful in high school. He was elected student council president in grade 12 and he won an academic award in French Language Arts. Mr. Kobylnyk detailed a number of awards that he received while at school.

d) At the University of Calgary, Mr. Kobylnyk obtained a Bachelor of Arts degree in Canadian studies. During his university years, he taught part-time at the Mount Royal College (now Mount Royal University) Speech Arts and Public Speaking program. Mr. Kobylnyk began developing his public speaking skills from a young age.

e) Mr. Kobylnyk obtained his law degree from the University of Alberta where he won an academic award for the top mark in immigration law. In the event that he did not secure articles, Mr. Kobylnyk stated that he had been accepted to be a member of Canada's Foreign Service.

f) Following law school, Mr. Kobylnyk articled with a Calgary law firm. He was called to the Alberta bar on February 11, 2000. Sometime in 2002 Mr. Kobylnyk went to work for another large firm for about five years in their litigation and insolvency departments. Mr. Kobylnyk then went on to work as in-house counsel with a junior mining company. After uncovering an insider trading scheme, Mr. Kobylnyk resigned and started working as a sole practitioner.

g) As a sole practitioner Mr. Kobylnyk detailed a number of successful matters that he acted as counsel, and he provided a detailed accounting of a number of successful clients for whom he acted. Included was a list of "important decisions" where Mr. Kobylnyk was the effective counsel, including:

- Two articles about the *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 (CanLII).

- *376101 Alberta Ltd. v. Westvillage Condominiums Ltd*., 2015 ABPC 188.

- The Real Estate Council of Alberta hearing decision dated December 13, 2018 in respect of Z.B. (who was also a witness).

- *Bahadar v Real Estate Council of Alberta*, 2019 ABQB 633.

- *Bahadar v Real Estate Council of Alberta*, 2021 ABQB 395.

41. Mr. Kobylnyk spoke at length about the detrimental impact that sleep apnea has had on his life. Several online articles and resources were submitted by Mr. Kobylnyk outlining the causes and effects of sleep apnea. Mr. Kobylnyk did not feel it necessary to call medical experts since sleep apnea is commonly known and understood and there is a "plethora of materials that are available to the general public online." Also pointed out by Mr. Kobylnyk was that he did not have a doctor supervising him during sleep therapy treatments.

42. Mr. Kobylnyk stated that his sleep apnea problem began around 2013 and that his snoring became progressively worse over time. By 2015 the snoring was so loud that his wife purchased noise cancelling headphones. Each morning Mr. Kobylnyk would wake feeling like he had hardly slept. At times Mr. Kobylnyk was told by his wife that he would stop breathing and he would wake each morning feeling "totally and utterly exhausted" and often with migraine headaches. Mr. Kobylnyk started consuming coffee and 5-hour Energy drinks.

43. This prolonged period of time without adequate rest left Mr. Kobylnyk feeling depressed and angry at his situation. Mr. Kobylnyk stated that he felt "heartbroken" by interrupting his wife's sleep and that he withdrew from social circles causing him to lose friends.

44. Mr. Kobylnyk asserts that he developed a coping mechanism where he would select and work only on files he enjoyed. The failure to respond to the LSA was, according to Mr. Kobylnyk, part of his coping mechanism where he would work on what he enjoyed to the detriment of other matters, including responding to the LSA. Mr. Kobylnyk stated during his argument:

> Then when the Law Society came knocking, my relentless sleep-deprived frustrated and depressed mindset undeniably impaired me, as did the repetitive low and constantly fluctuating oxygen saturation levels in my body. And I see that now. But I was afflicted to realize it then. In my sleep deprived mind, I was angry and frustrated with the Law Society was (sic) coming after me, especially when I was trying so hard to cope, and was achieving outstanding results on most of my files.

45. Mr. Kobylnyk stated that that his conspiratorial beliefs about the LSA "were obviously reckless and irresponsible". As part of a coping mechanism Mr. Kobylnyk felt he was simply trying to put off unpleasant matters such as the LSA complaints and just focus on interesting and enjoyable litigation files. Mr. Kobylnyk acknowledges that he acted "outrageously" in dealing with the LSA investigators. Mr. Kobylnyk indicated that he was

"truly ashamed and utterly embarrassed" by his behaviour. The sleep apnea was not offered as an excuse for the behaviour, but rather as an explanation for the misconduct. Mr. Kobylnyk argues that his failure to respond to and cooperate with the LSA was the impairment caused by the severe sleep apnea that left Mr. Kobylnyk in an unhealthy state of mind which led to these failings.

46. Mr. Kobylnyk made reference to a diagnostic report dated July 22, 2016, which he argued was "cold, hard actual data" that supported his claims about the severity of his sleep apnea. This report arose after Mr. Kobylnyk attended at a sleep clinic and received a device called a Continuous Positive Airway Pressure (CPAP) machine that provided Mr. Kobylnyk with immediate improvement in his sleep. In referencing the diagnostic report, Mr. Kobylnyk pointed out that the report indicated that he had severe sleep apnea.

47. Regarding the timeline for the use of the CPAP, Mr. Kobylnyk first used a CPAP machine in late 2016, but that one was not working. In 2017 Mr. Kobylnyk tried a few other types of CPAP machines, but a final machine was purchased by Mr. Kobylnyk in January of 2018. It was with this 2018 machine that Mr. Kobylnyk started receiving "fulsome treatment" for his sleep apnea.

48. Mr. Kobylnyk also made submissions about his 60-day suspension from his prior citations, which suspension commenced August 2, 2019. Mr. Kobylnyk stated that he had entered into a settlement agreement with the LSA where it was "stipulated that I would return to practice on November 1, 2019" but that the LSA "refused to allow me to return to practice." As of June 11, 2024, Mr. Kobylnyk had been suspended for almost five years and this should be a sanctioning consideration. According to Mr. Kobylnyk, this length of suspension has had a detrimental impact on his ability to earn a livelihood and has caused him humiliation. The online notice of suspension by the LSA impacted Mr. Kobylnyk's ability to obtain work and to pursue business ventures.

49. Mr. Kobylnyk indicated that he has a possible job opportunity with the Judge Advocate General branch with the Canadian military. In addition, Mr. Kobylnyk testified that he has received a job offer as an associate with a law firm.

50. It was further argued by Mr. Kobylnyk that the citations before us predated the matters which arose under the August 2, 2019 suspension and that matters should have been dealt with together to avoid multiple proceedings.

51. Mr. Kobylnyk called nine character witnesses, as follows:

    a) D.W., an Asset Manager of strip malls and residential rental properties, was a former client of Mr. Kobylnyk when he was employed at a large firm. Mr. Kobylnyk successfully and quickly dealt with an application for summary

judgment on behalf of D.W. Over time D.W. and Mr. Kobylnyk, along with their spouses, became social acquaintances. Over the subsequent years D.W. sought out Mr. Kobylnyk for additional legal assistance on other matters. D.W. stated that Mr. Kobylnyk was the only lawyer he would refer to somebody else that was seeking a litigation lawyer and that he would not hesitate to retain Mr. Kobylnyk in the future. D.W. had not reviewed the Merits Decision.

b) M.S., a retired nurse, was aware of Mr. Kobylnyk's sleep apnea and the treatments that Mr. Kobylnyk had sought in respect of that condition. Mr. Kobylnyk acted for M.S.'s husband for some 15 years. The husband, who had recently passed away, and Mr. Kobylnyk were good friends. M.S. stated that if her husband were still alive that he would have supported Mr. Kobylnyk in this matter. M.S. read from her prepared statement where she stated that her late husband found Mr. Kobylnyk to be "well prepared, very organized" and that Mr. Kobylnyk gave "100 percent of his energy to advocate and represent" the husband. M.S. stated that she would absolutely hire Mr. Kobylnyk as her lawyer in the future. M.S. indicated that she "glanced" at the Merits Decision but did not read it.

c) J.H. is a solicitor in the United Kingdom and has been at the bar for over 30 years. J.H. stated that he had known Mr. Kobylnyk for some 15 years after initially acting on behalf of a mutual client. Mr. Kobylnyk and J.H. continued to remain in personal contact and J.H. has further retained Mr. Kobylnyk to deal with other matters. J.H. felt that Mr. Kobylnyk was the "only one that I wanted to have represent us in a litigating capacity." J.H. had received praise from Judges about the quality of the Court-filed documents which had been prepared by Mr. Kobylnyk. Over the years, J.H. had referred other persons to Mr. Kobylnyk and J.H. would not hesitate to hire Mr. Kobylnyk again. J.H. was not "familiar with what" Mr. Kobylnyk had been found guilty of, but J.H. acknowledged that it is important for a lawyer to cooperate with the regulator.

d) J.V., a professional engineer, had a neighbouring office in the same building as Mr. Kobylnyk. J.V. retained Mr. Kobylnyk to deal with a lawsuit where J.V.'s company was sued as a result of a drilling rig accident in Texas. Mr. Kobylnyk was able to have the claim dropped after meeting with the Plaintiff's lawyer. Mr. Kobylnyk and J.V. continued to remain in contact over the years and Mr. Kobylnyk acted for J.V. on a complaint filed with the Association of Professional Engineers and Geoscientists of Alberta. J.V. stated that Mr. Kobylnyk had done "excellent" legal work for J.V. and that J.V. would consider retaining Mr. Kobylnyk again.

e) K.B. had known Mr. Kobylnyk for some six years after meeting one another through curling. K.B. had extensive experience in youth sports, including curling,

baseball and hockey. K.B.'s son was a member of the curling team coached by Mr. Kobylnyk. K.B. spoke highly of Mr. Kobylnyk's commitment as a curling coach and the excellent rapport that Mr. Kobylnyk had with the young competitors. K.B. and Mr. Kobylnyk have maintained a good friendship post curling.

f) Z.B., a realtor, hired Mr. Kobylnyk in 2008 to act as his lawyer in respect of a complaint with the Real Estate Council of Alberta (RECA). Z.B. said that Mr. Kobylnyk's advocacy skills were "excellent" and that the abuse of process application brought by Mr. Kobylnyk was successful. Z.B. then retained Mr. Kobylnyk to sue RECA for malicious prosecution and Mr. Kobylnyk successfully defended the application to strike the Statement of Claim. Z.B. stated that he felt that Mr. Kobylnyk was an "excellent" lawyer and an honest person. Z.B. stated that he did review the Merits Decision.

g) D.B., a realtor, first retained Mr. Kobylnyk in 2012, and over the years Mr. Kobylnyk handled about 20 different legal matters for D.B.'s company. This company, which built high quality inner-city homes, had sued various trades and in almost all cases Mr. Kobylnyk was able to obtain a successful result. Mr. Kobylnyk also successfully dealt with a RECA complaint filed against D.B., who stated that Mr. Kobylnyk was "very meticulous, very professional" and "very knowledgeable". D.B. would not hesitate to again hire Mr. Kobylnyk. D.B. did not read the Merits Decision.

h) C.L, a flight attendant, gave evidence that she and Mr. Kobylnyk have been friends for over 30 years. Mr. Kobylnyk acted for C.L. in renewing a commercial lease agreement and C.L. consulted Mr. Kobylnyk on other matters over the years. C.L. stated that she would not have any problem hiring Mr. Kobylnyk as a lawyer. C.L. found Mr. Kobylnyk to be "very thorough, very honest" and "very professional". C.L. "briefly" looked at the Merits Decision, but that did not change her opinion of Mr. Kobylnyk.

i) L.C. has been working for some 25 years in the oil and gas industry. L.C. first met and retained Mr. Kobylnyk around 2003 regarding a debenture agreement, which eventually resulted in a successful settlement. L.C. again retained Mr. Kobylnyk in 2014 regarding a contractual matter and again later on an issue with the Canada Revenue Agency. On this latter matter L.C. had done a good job during questioning. L.C. found Mr. Kobylnyk to be "honest, hard-working, and diligent" and he would again hire Mr. Kobylnyk as his lawyer.

52. Mr. Kobylnyk argues that there was no evidence from any clients that Mr. Kobylnyk was a danger to them or the public, or that Mr. Kobylnyk caused them to lose faith in the legal profession. Furthermore, Mr. Kobylnyk states that he has never breached any trust

conditions, stolen client monies, unethically billed clients, lied to the courts or altered court documents.

53. Mr. Kobylnyk argues that disbarment is akin to capital punishment and to that extent character evidence should not be considered "less important in a regulatory body hearing than in criminal". Mr. Kobylnyk further argues that there were no issues regarding client records or property, there was no evidence of client harm and no refusal to attend hearings.

54. Regarding sanction, Mr. Kobylnyk states that in view of his severe sleep apnea, and his already five-year suspension, that a fine would be the most appropriate sanction in this case.

Sanctioning Analysis

55. In arriving at the 15-month suspension, the Committee will firstly address the following specific sanctioning considerations:

- Governability
- Medical Condition: Sleep Apnea
- Character Evidence
- Time Served

Governability: Legal Factors

56. Because the term "ungovernability" is not defined in the Rules, counsel for the LSA referred the Committee to a number of case authorities in which hearing panels reviewed the concept and indicia of ungovernability.

57. The Alberta Court of Appeal in *Alsaadi*[12] has defined ungovernability as follows:

> …A professional can be said to be ungovernable if he or she fails to accept the authority of the professional organization or intimates that he or she is not bound by rules and standards of the profession…

58. Of further guidance is the decision in *Law Society of Upper Canada v. Shifman*[13] where the Appeal Division of the Law Society of Upper Canada set out a two-part test for ungovernability:

[12] *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313, at paragraph 68.
[13] *Law Society of Upper Canada v. Shifman*, 2014 ONLSTA 21 at paragraph 25.

We find it helpful to restate the principles to be considered in relation to ungovernability as a two-part analysis:

1) Is the nature, duration and repetitive character of the licensee's present and past misconduct sufficiently serious that it suggests an unwillingness or inability to be governed by the Law Society, notwithstanding progressively increased penalties for repeated incidents of misconduct?

2) If so, in light of all of the circumstances, is revocation appropriate? This involves balancing the nature of the misconduct and disciplinary history against mitigating factors including:

    a. any character evidence;

    b. the existence of remorse and a recognition and understanding of the seriousness of the misconduct;

    c. evidence that the licensee is willing to be governed by the Society;

    d. medical or other evidence that explains (although does not excuse) the misconduct;

    e. the likelihood of future misconduct, having regard to any treatment or other remedial efforts undertaken;

    f. the licensee's ongoing co-operation with the Society in addressing the outstanding matters that are the subject of the misconduct and other regulatory matters.

59. The Committee has also considered the case of *Law Society of British Columbia v. Lessing*[14] and in particular the "Hall" factors as described therein. The *Lessing* hearing panel wrote:

> Generally speaking, a lawyer must accept that their conduct will be governed by the Law Society, they must respect and abide by the rules that govern their conduct and they must deal with the Law Society in an honest, open and forthright manner at all times (*Law Society of BC v. Spears,* 2009 LCBC 28, at paras. 7 to 9).
>
> Ungovernability may include a pattern of pervasive, serious misconduct, illustrative of wanton disregard and disrespect for the regulatory process. In *Hall*, at paras. 27 and 28, the hearing panel identified a number of factors that may

[14] *Law Society of British Columbia v. Lessing (Re)*, 2022 LSBC 7, at paragraphs 11-12.

individually or collectively give rise to a finding of ungovernability when present, as follows:

(a) a consistent and repetitive failure to respond to the Law Society's inquiries;

(b) an element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records;

(c) some element of misleading behaviour directed to a client and/or the Law Society;

(d) a failure or refusal to attend at the discipline hearing convened to consider the offending behaviours;

(e) a discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances;

(f) a history of breaches of undertaking without apparent regard for the consequences of such behaviour; and

(g) a record or history of practicing law while under suspension.

60. Counsel for the LSA has also brought to our attention the decision in *Law Society Upper Canada v. Zygmunt John Fenik.*[15] In that case the panel discussed ungovernability as follows:

> The principals which inform a finding of ungovernability are set out in *Law Society of Upper Canada v. Hicks*, 2005 ONLSHP 2. A finding of ungovernability is based on a case-by-case analysis. The guiding principle is the public interest. It is essential that members of this profession be willing to be governed by the Society, and to adhere to its dictates. Otherwise, the public cannot be protected.
>
> Factors which inform the determination whether a member is ungovernable include the following:
>
> (a) the nature, duration and repetitive character of the misconduct;
>
> (b) any prior discipline history;
>
> (c) any character evidence;

[15] *Law Society Upper Canada v. Zygmunt John Fenik*, 2005 ONLSHP 25, at paragraph 83-84.

(d) the existence or lack of remorse. Remorse includes a recognition and understanding of the seriousness of the misconduct.

(e) the degree of willingness to be governed by the Society;

(f) medical or other evidence that explains (though does not excuse) the misconduct;

(g) the likelihood of future misconduct, having regard to any treatment being undertaken, or other remedial efforts;

(h) the member's ongoing co-operation with the Society in addressing outstanding matters that are the subject of the misconduct.

61. The Committee sees no material distinction between the ungovernability definitions and factors in the *Alsaadi, Shifman, Lessing* or *Fenik* decisions. The common aspects of these definitions are that there is: (1) a failure by a member to accept the authority of the profession and an unwillingness or inability to be governed by their Law Society or that (2) the member wantonly disregards and disrespects the rules and regulatory processes of their Law Society.

62. Following the *Alsaadi* decision, and with an adoption of the *Lessing, Fenik* and *Shifman* factors, this Committee would adopt the following test and factors for a finding of ungovernability:

- Has the member failed to accept the authority of the LSA, has the member intimated that he or she is not bound by the rules and standards of the profession or has the member shown a wanton disregard and disrespect for LSA regulatory processes as maybe evidenced by the following, non-exhaustive, factors:

    i. The nature, duration and repetitive character of the misconduct such that has the member shown a consistent and repetitive failure to respond to the LSA's inquiries.

    ii. Does the member have a discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances.

    iii. Does the member have a history of breaches of undertaking without apparent regard for the consequences of such behaviour.

    iv. Has the member shown an element of neglect of duties and obligations to the LSA with respect to trust account reporting and records.

v. Are some elements of any misleading behaviour directed to a client, the courts, other counsel and/or the LSA.

vi. Has there been a failure or refusal by the member to attend at the discipline hearing convened to consider the offending behaviours.

vii. Does the member have a record or history of practicing law while under suspension.

63. A finding of ungovernability may often result in disbarment. However, there are considerations as described in the *Alsaadi, Lessing, Fenik* and *Shifman* decisions which would mitigate against disbarment, including such non-exhaustive factors as the following:

a) Any character evidence.

b) Is there a past discipline record.

c) The existence of remorse and a recognition and understanding of the seriousness of the misconduct.

d) Evidence that the member is willing to be governed by LSA and the degree of willingness to be governed by the LSA.

e) Medical or other evidence that explains (although does not excuse) the misconduct.

f) The likelihood of future misconduct, having regard to any treatment or other remedial efforts undertaken.

g) The member's ongoing co-operation with the LSA in addressing the outstanding matters that are the subject of the misconduct and other regulatory matters.

h) Has the member admitted a number of the allegations against him.

Prior Decisions

64. The Committee is mindful that there is rarely a prior decision that corresponds exactly with the matter at hand. We would however offer the following distinctions with the cases provided by the LSA:

a) In the *Zilinski* decision there were 48 citations on 13 distinct complaints, and the member was found guilty on 41 of those citations, which included misappropriation of funds and a finding of a lack of governability, honesty and integrity. That hearing committee held at paragraph 39 of the written decision that "Mr. Zilinski is dishonest, lacks integrity, and is ungovernable, that no remedy short of disbarment can properly protect the public." There is no evidence that Mr. Kobylnyk was dishonest or lacking in integrity (though there were some elements of deceit in Mr. Kobylnyk's dealings with clients).

b) In the *Thomas* matter, the member was found guilty on 10 of 13 citations and disbarred. These citations were very serious and included attempts to mislead law enforcement officials, giving inconsistent evidence and lying under oath, misappropriating a substantial amount of funds over an extended period of time and failing to respond to the LSA. The misconduct of Mr. Kobylnyk does not rise to the same level of as that of Mr. Thomas.

c) In the *Enge* case, the Committee would note that the member failed to attend at the hearing to give evidence, which was a consideration in respect of the finding of failing to cooperate. Mr. Kobylnyk did of course attend at the hearing of this matter. In addition, that hearing committee found the member guilty of failing to honour trust conditions, which is not an element of the misconduct of Mr. Kobylnyk.

d) The *Virk* matter, which was upheld on appeal to the Alberta Court of Appeal, found the member guilty on 14 citations relating to failures to serve clients, acting in a conflict of interest, acting with impropriety against other lawyers and failing to cooperate with the regulator. A distinguishing feature of this decision is that the hearing committee found that Mr. Virk intentionally lied at the hearing[16] which the Committee would suggest distinguishes this decision from the behaviour of Mr. Kobylnyk.

e) In the *Ewasiuk* matter, the member was found guilty of 20 citations relating to failures to reply to undertakings, failing to serve clients, misleading clients about the status of their matters and failure to cooperate with the regulator. In this instance there was an issue of integrity (as well as governability), which involved deceitfully perpetuating phony settlements, which is not the case with Mr. Kobylnyk.

f) In the *Peterson* case, the member was convicted of two citations including failure to serve clients and failure to reply to the LSA. Mr. Peterson had a disciplinary record for similar misconduct. In this situation the member failed to attend at his hearing, even after the panel advised that they were considering a disbarment.

[16] *Law Society of Alberta v. Virk*, 2019 ABLS 25, at paragraph 57.

The panel found that a further suspension would serve no purpose and they disbarred Mr. Peterson. Mr. Kobylnyk of course did attend at the hearing.

g) In the *Wickham* decision, the member was convicted of 17 particulars arising out of four complaints, which generally related to failures to respond to the Law Society, failures to serve clients, failure to produce records, failure to reply to other lawyers and failing to account for money. The majority recommended a suspension, with the dissent seeking disbarment. The convocation of the full panel of benchers accepted the dissent recommendation and disbarred the member primarily because the evidence suggested serious governability concerns and a history of flippant or incomplete responses. This decision is distinguishable from Mr. Kobylnyk's situation in that the degree of ungovernability in the *Wickham* case was greater in that it occurred over the course of a 10-month period where the lawyer was repeatedly contacted by the Law Society in the form of 19 letters, 3 visits, and 23 telephone calls, and no replies were provided to the Law Society. Also, Mr. Wickham called no character evidence, whereas Mr. Kobylnyk did.

65. On the issue of governability, Mr. Kobylnyk argued that the decision in *Law Society of Alberta v Carlson*[17] was directly applicable to his case. Mr. Carlson was found guilty of failing to serve his client in a timely manner and that he failed to reply to communications from the LSA. Mr. Carlson was suspended for six months. Mr. Carlson had two prior sanctions: (1) a three-month suspension in 2012 in respect of improperly accepting compensation other than the appropriate legal fees from a party seeking to achieve an improper purpose, representing clients in business transactions in breach of securities law and failing to be candid with the LSA and (2) in 2019 a one month suspension (joint submission) for failing to sign a court order, failing to respond to communications from opposing counsel and failure to finalize and file an order on behalf of his client. In this matter Mr. Carlson's degree of not responding to the LSA was appreciably less than that of Mr. Kobylnyk.

Findings: Governability

66. The Committee finds that Mr. Kobylnyk has certainly demonstrated a past unwillingness to be governed by the LSA and that he has all too often failed to accept the authority of the LSA. This is evidenced by the following reasons:

a) Mr. Kobylnyk has a prior disciplinary record in 2019 where he admitted to not responding to the LSA on some six separate occasions between May 9, 2016 and March 22, 2017.

[17] *Law Society of Alberta v Carlson*, 2023 ABLS 2.

b) Mr. Kobylnyk blamed a lack of email access to his firm account after his suspension in 2019, despite evidence that Mr. Kobylnyk had access to that email during the relevant time periods.

c) Mr. Kobylnyk refused to provide evidence of an alleged email outage.

d) Mr. Kobylnyk accused the LSA of destroying or mishandling his files that were taken over following his suspension in 2019, which allegation was not proven. Mr. Kobylnyk continued to make this allegation at the sanctioning phase.

e) Mr. Kobylnyk failed to attend most of the Pre-Hearing Conferences. On the one occasion when he did attend, he stated that he viewed the proceedings as being unfair and referred to the LSA as a "corrupt body".

f) Mr. Kobylnyk is of the opinion that the LSA is engaged in a conspiracy against him, which allegation is completely without any merit.

g) Mr. Kobylnyk breached his undertaking to respond and cooperate with the LSA on several occasions. The timing of these breaches is concerning since the undertaking was given May 6, 2019 and Mr. Kobylnyk then failed to cooperate or respond after this date. Mr. Kobylnyk's excuse was that he believed that the undertaking was no longer in effect since he was suspended. This excuse is completely without any merit.

h) Mr. Kobylnyk's discipline record has involved allegations of professional misconduct over a period of time and involving a series of different circumstances.

67. As already stated, the usual penalty for ungovernability is disbarment. However, mitigating factors can be of such sufficiency as to warrant a suspension, albeit often a long one. While this Committee makes a finding of ungovernability, we are not prepared to disbar Mr. Kobylnyk for the following reasons:

a) While there is certainly a past history of failing to respond to the LSA, failing to be candid with the LSA, and failing to comply with undertakings, this Committee does not view this past disciplinary record as rising to a level of being a wanton disregard and disrespect for the regulatory processes.

b) Mr. Kobylnyk was apologetic and appeared to be remorseful for his actions and embarrassed by his misconduct.

c) Mr. Kobylnyk admitted that he failed to reply and that he was "combative" and "sure as heck uncooperative". As such, Mr. Kobylnyk acknowledged that his

actions and he did not try to otherwise justify his misconduct. His evidence about his sleep apnea were tendered as an explanation for his behaviour, not a defense.

d) While there were five guilty findings of breaching the undertaking, these breaches overlapped to a large degree in that the requests from the LSA were in a number of instances requests for more than one complaint.

e) The past transgressions in this matter overlapped to some degree with the matters considered at the previous 2019 LSA hearing.

f) Mr. Kobylnyk has provided character evidence. In particular he called nine persons, including friends, former clients and a lawyer, who confirmed that Mr. Kobylnyk is a competent and capable lawyer.

Medical Condition: Sleep Apnea

68. Mr. Kobylnyk provided the Committee with a diagnostic report dated July 22, 2016 along with the following online articles (which were reviewed by the Committee, but not entered as exhibits):

a) “Apnea-Hypopnea Index (AHI)” dated January 2, 2024 (unknown source).

b) “Obstructive Sleep Apnea” (no date) from Cedars Sinai Health Library.

c) “The Effects of Sleep Apnea on the Body” dated June 26, 2023 (unknown source).

d) “Sleep Apnea” from Public Health Agency, Government of Canada dated April 22, 2013.

e) Untitled article from the Mayo Clinic dated July 14, 2023.

f) “The Consequences of Obstructive Sleep Apnea” dated April 4, 2024, Sleep Disorder Australia.

g) “Obstructive Sleep Apnea” from Penn Medicine dated January 9, 2023.

69. Mr. Kobylnyk has argued that the diagnostic report, coupled with the online articles about sleep apnea, establishes credible evidence to support how Mr. Kobylnyk was affected and impacted by sleep apnea. Mr. Kobylnyk’s position was that the online articles are from reputable sources and those articles provide information about what the

test results from the diagnostic report indicate. Mr. Kobylnyk was asking the Committee to interpret the diagnostic report based on these articles.

70. Mr. Kobylnyk further argues that the diagnostic report, coupled with the articles, clearly establishes that he has severe sleep apnea and that no expert medical evidence is necessary. While the Committee is prepared to accept that sleep apnea can lead to a number of health issues, the Committee is not prepared, without expert evidence, to find that Mr. Kobylnyk's sleep apnea, even if it is severe, has caused the misconduct. Articles, no matter how reliable the source, cannot function as the necessary expert evidence to establish a causal connection between the misconduct and the sleep apnea. Neither this Committee, nor Mr. Kobylnyk, is in a position to make that connecting link.

71. Mr. Kobylnyk offered his opinions about the nature and impact of the sleep apnea on his physical and emotional well-being. However, the diagnostic report, and the interpretation of same, is not a matter that Mr. Kobylnyk can provide opinion evidence. Mr. Kobylnyk is not an expert, despite his personal experiences with sleep apnea, and he is not qualified to provide evidence that interprets a diagnostic report.

72. Opinion evidence is presumptively inadmissible, and Mr. Kobylnyk fails to meet the requirement of offering special expertise. These considerations were set out in *R v Sandoval-Barillas*:[18]

> Opinion evidence is presumptively inadmissible: see ***R v Wiens***, 2016 BCCA 34, 332 CCC (3d) 542, leave denied [2016] SCCA No 189 (QL) (SCC No 36960). The test for establishing admissibility of particular opinion in a given case, as also noted in ***Awer***, is a circumstance sensitive exercise for which a trial judge is entitled to deference: ***Mouvement laïque québécois v Saguenay (City)***, 2015 SCC 16 at para 105, [2015] 2 SCR 3. The Supreme Court has encapsulated its recent expositions on this topic in ***R v Bingley***, 2017 SCC 12, 345 CCC (3d) 306 as follows:
>
> > 14 The expert evidence analysis is divided into two stages. First, the evidence must meet the four Mohan factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.
> >
> > 15 If at the first stage, the evidence does not meet the threshold Mohan requirements, it should not be admitted. …

73. Mr. Kobylnyk does not possess special knowledge or expertise in respect of sleep apnea as a medical condition and as such any opinion evidence given by Mr. Kobylnyk fails to

[18] *R v Sandoval-Barillas*, 2017 ABCA 154, at paragraph 55.

meet the fourth *Mohan* factor and is inadmissible. The Committee does not dispute the claim by Mr. Kobylnyk that he suffers from severe sleep apnea or that this appears to have taken a physical and emotional toll on Mr. Kobylnyk. That does not make Mr. Kobylnyk an expert to conclude that his sleep apnea was the cause or contributed to the misconduct.

74. While these articles do discuss in detail the medical condition of sleep apnea, this Committee is not medically qualified to properly interpret those articles or to properly interpret the diagnostic report. It can be tempting to use the articles as providing valid information about sleep apnea, but it is a dangerous precedent to allow online articles to take the place of actual expert medical evidence. The internet can, and often does, contain conflicting information that can be tailored to meet whatever objective or opinion one may be seeking. Medical issues, such as sleep apnea, are complex matters that require a properly qualified third-party expert to interpret. This is especially the case where Mr. Kobylnyk is trying to establish a causal connection between his misconduct and the sleep apnea condition.

75. The other consideration for this Committee is the time when the misconduct arose and when Mr. Kobylnyk began using the CPAP machine in 2017, though Mr. Kobylnyk's evidence was that he did not begin to see positive benefits until 2018. The relevant citations and their timelines were as follows:

- Citation 1: June 21, 2018 email from opposing lawyer to Mr. Kobylnyk regarding court date to speak to costs, with no reply by Mr. Kobylnyk.

- Citation 2: February 8, 2018, February 16, 2018, March 5, 2018, February 12, 2019, March 8, 2019, April 17, 2019, May 7, 2019, and May 24, 2019 communications from LSA without any response by Mr. Kobylnyk.

- Citation 5: Client retained Mr. Kobylnyk on March 16, 2018 and nothing had been filed with the Court contrary to the client's instructions.

- Citation 8: Invoices from a Court Reporter issued between December 12, 2017 and October 17, 2018 that were not paid by Mr. Kobylnyk.

- Citation 9: Between April 13, 2018 and October 15, 2018 Mr. Kobylnyk failed to respond to a request for payment of an invoice.

- Citation 21: Mr. Kobylnyk received invoices from another Court Reporter for services between April and July of 2019, which invoices were not paid.

76. As evidenced by these timelines, much of misconduct arose after January 1, 2018, which is especially the case with the failure to communicate with the LSA. Mr. Kobylnyk

was asked to explain how the misconduct was related to his sleep apnea, when he had began using a CPAP machine in January of 2018. In response Mr. Kobylnyk did state that due to issues with the mask causing burning of the nose, he did not always use the CPAP machine. The machine would be used if Mr. Kobylnyk had a big case, but otherwise it would not be used on "less important days, like weekends". Mr. Kobylnyk stated that the mask issue was resolved, and he started using the CPAP machine on a nightly basis "at the end of the curling season in 2019" (which the Committee is assuming is the spring of 2019).

77. This Committee is prepared to accept the evidence of Mr. Kobylnyk that he suffers from severe sleep apnea and that he has suffered a number of issues from this condition that resulted in changes in physical and mental functioning. However, Mr. Kobylnyk by his own admission was receiving effective benefits from the CPAP machine in 2018 and there cannot be any causal connection between the sleep apnea and the misconduct arising in 2018 and later.

78. Mr. Kobylnyk argued that he did not call medical evidence because none exists other than the diagnostic report from the sleep clinic. The medical evidence that could have been called would have been from a qualified medical professional that could provide evidence that would indicate that the sleep apnea condition of Mr. Kobylnyk caused, or could have caused, the misconduct.

79. The Committee finds that the diagnostic report and the online articles do not establish any causal connection between the misconduct and the sleep apnea condition of Mr. Kobylnyk.

Time Served

80. On the issue of time served, counsel for the LSA asserts that where a member such as Mr. Kobylnyk makes it difficult for the LSA to "chase him in his disciplinary proceedings … ought not to get mitigating credit". Mr. Kobylnyk argues that he has now been effectively suspended for almost five years and should get some credit.

81. Two decisions were provided by LSA counsel on the issue of providing Mr. Kobylnyk with credit for "time served" since his suspension in 2019: *Law Society of Alberta v Juneja*[19] and *Law Society of Alberta v. Ralh.*[20]

82. In the *Juneja* matter, that hearing committee concluded the following at paragraph 82:

> The HC is skeptical that a credit for time served should normally be allowed. Criminal sentencing concepts should not be adopted without considering whether

[19] *Law Society of Alberta v Juneja*, 2014 ABLS 32.
[20] *Law Society of Alberta v. Ralh*, 2023 ABLS 9.

they are appropriate in the regulatory context, where the standing and reputation of the legal profession is a paramount consideration. Allowing "time served" on a routine basis to the most risky practitioners, who are subject to an interim suspension, may erode the confidence of the profession and the public in the independent regulatory process, and in turn the standing of the profession in the eyes of the public. This is particularly so where the suspension is reduced to a nominal period, such as one day. Moreover, if a credit were normally allowable, what stops arguments that practitioners should be allowed credits for other adverse impacts from normal and necessary conduct procedures, such as publication of pending citations? Should credits only be allowed to remedy fairness concerns, such as where there was excessive delay in the process, or to respond to other unique considerations?

83. In the *Ralh* matter the hearing committee stated at paragraph 29:

> The *Act,* the Rules of the LSA and the Guideline provide a detailed outline of factors to be considered in determining sanction. Credit for time already served by automatic or voluntary suspension is not a stated factor. Unlike criminal law, LSA proceedings do not generally incorporate the concept of time served. However, in some cases the LSA has reduced the length of suspensions as a result of time served by voluntary suspension. Examples are *Law Society of Alberta v. Elgert,* 2012 ABLS 9 and *Law Society of Alberta v. Prithipaul,* 2018 ABLS 17.

84. In the *Elgert* decision, the member had a "self-imposed exile from the profession following the expiration of the original six-month suspension."[21] In that decision the hearing committee, at paragraphs 54-55, went on to state:

> The Hearing Committee does not view the Member's self-imposed period of inactivity in this case as being akin to an interim suspension, nor governed by the same principles. The interim suspension in *Kryvenko* was involuntary, and was not imposed as a result of a finding of misconduct in the disciplinary process.
>
> Here, the Member voluntarily withdrew from the profession for an additional period of approximately one year, following the previous Hearing Committee's directions on sanction, while he reflected on the errors that resulted in multiple client complaints. His evidence before this Hearing Committee, which the Panel accepts, was that one of the reasons for his withdrawal was that he felt a disservice might befall his clients if he obtained reinstatement, only to then be suspended again. The Member therefore demonstrated self-awareness and attention to client interests, which serve to mitigate the need for a harsh sanction. A similar conclusion was reached by a Hearing Committee in *Law Society of*

[21] *Law Society of Alberta v. Elgert*, 2012 ABLS 9, paragraph 52.

Alberta v. Aperocho, 2009 LSA 25 where a lawyer's decision to voluntarily place himself on the inactive list, and by his own actions protect the public, was held to be a mitigating factor in assessing the sanction.

85. In the *Prithipaul* matter the hearing committee stated the following at paragraph 34:

> Given that Mr. Prithipaul has already been suspended for one year, albeit as a statutory automatic suspension, a further one-year suspension will be imposed by this Committee.

86. The fundamental consideration is whether the reduction of the suspension for time served will erode the confidence of the public or the profession in the regulatory process. Time served is not a sanctioning factor under the Rules and as such should be only used in limited cases. Furthermore, this is a discretionary sanctioning consideration and should be determined on a case-by-case basis.

87. With these principles in mind, this Committee has adopted the following factors in determining whether "time served" should be allowed:

a) Did the member voluntarily withdraw from the profession? This would include, for example, where a member has elected to become inactive. However, where a member is already suspended it cannot be said that they have voluntarily withdrawn.

b) Where a member voluntarily withdrew, it is important to consider the reasons for that withdrawal and what relevant events took place during that withdrawal. For example, did the member takes steps in the nature of rehabilitation?

c) Where a member did not voluntarily withdraw, but was suspended, was the member entitled to be reinstated? If so, why did the member not seek reinstatement? If there has been a delay in proceeding to hearing, did the member contribute to that delay?

88. This Committee is not prepared to grant Mr. Kobylnyk any credit for the time he has served under his current suspension for the following reasons:

a) Mr. Kobylnyk did not voluntarily withdraw from the legal profession – he was suspended.

b) Mr. Kobylnyk did not seek reinstatement because of some disservice that might befall clients if he was suspended again, but rather Mr. Kobylnyk elected not to be reinstated because he felt that the application would not be successful. Mr. Kobylnyk's evidence was that he was told that the LSA would be opposing his reinstatement application because of the "new" conduct matters. Based on this

Mr. Kobylnyk did not proceed with the reinstatement application because he felt that his "chance of winning" would be remote. Mr. Kobylnyk chose not to seek reinstatement – that was not imposed on him by the LSA.

c) Mr. Kobylnyk claims that he negotiated a deal with the lawyers who were acting on behalf of the LSA at the 2019 LSA hearing. Mr. Kobylnyk says that the lawyers told him that the reinstatement process was being waived. Mr. Kobylnyk stated that he "justifiably expected to return to practice on November 1, 2019." There is no evidence of any settlement agreement, and it is not reasonable to conclude that independent LSA counsel would have entered into such an agreement. Even if such agreement was reached, Mr. Kobylnyk did not take any steps on or after October 31, 2019 to directly contact these lawyers with whom he claims to have reached a settlement agreement.

d) Mr. Kobylnyk stated that on October 31, 2019 he reached out to the LSA and he was not permitted to return to practice. There is not one iota of evidence that the LSA prevented Mr. Kobylnyk in any manner whatsoever from seeking reinstatement. It is not reasonable to find that LSA staff would have told Mr. Kobylnyk that he could not apply for reinstatement. Mr. Kobylnyk was well able to seek reinstatement on November 1, 2019 in accordance with the Rules. Mr. Kobylnyk asked the LSA to schedule a reinstatement hearing and he paid the necessary fee for same. Mr. Kobylnyk's evidence was that he did not follow up with the reinstatement hearing because it was taking too long.

e) Much of the delay in moving this matter forward was caused by the failure of Mr. Kobylnyk to properly,, and in a timely manner,, respond to the LSA.

89. This Committee appreciates that the suspension notice on the LSA website has likely caused work related issues for Mr. Kobylnyk, but this Committee has no control over that notice.

Character Evidence

90. Mr. Kobylnyk called nine character witnesses, some of them being former clients, some being personal friends, and some being both. Each witness spoke glowingly about Mr. Kobylnyk in terms of both his skills as a litigator and his professionalism. All of the witnesses stated that they would have no problem retaining Mr. Kobylnyk in the future should he become reinstated. However, many of the witnesses had not actually read the Merits Decision.

91. While character evidence can be of assistance, the Committee is mindful of the decision in *Bolton v. The Law Society*[22], where the English Court of Appeal stated:

[22] *Bolton v The Law Society* [1993] EWCA Civ 32, at paragraph 16.

> Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of a striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches on the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequences for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension for the wrong order it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

92. Based on the evidence of Mr. Kobylnyk's former clients, Mr. Kobylnyk appears to have been a capable lawyer. However, this was not always the case as noted by Mr. Kobylnyk's failings in respect of A.S.L. (Complaint 2) and J.D. (Complaint 4). The Committee places only a minimal value on the evidence of the nine-character witnesses for the following reasons:

- Many of the witnesses did not read or review the Merits Decision.
- None of the character witnesses and their evidence touches upon the central issue in this case, which is the governability of Mr. Kobylnyk.

Personal History

93. Mr. Kobylnyk also gave a detailed personal history of his life from a young age. While Mr. Kobylnyk has had a varied career and personal life, this is of very limited value in assisting this Committee in determining the appropriate sanction. This sanction hearing is not about Mr. Kobylnyk's life, and the difficulties he has experienced as a result of his prior suspension, but rather it is primarily concerning the governability of Mr. Kobylnyk.

94. The Committee does accept that Mr. Kobylnyk is remorseful and apologetic for his actions, though this is somewhat of a qualified apology since he blames the misconduct on his sleep apnea condition.

95. The Committee is also mindful that Mr. Kobylnyk continues to blame the LSA for destroying records, breaches of a purported settlement agreement and that the LSA prevented him from seeking reinstatement. Mr. Kobylnyk continues to make these claims despite the findings of this Committee. In particular Mr. Kobylnyk stated in evidence that the LSA prevented him from applying for reinstatement when in fact it was Mr. Kobylnyk who elected not to take any steps to set a reinstatement hearing.

Sanctioning Factors and Purpose

96. The Pre-Hearing and Hearing Guideline (Guideline) sets out the purpose of sanction as follows:

> [185.] The 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 profession. These fundamental purposes are critical to the independence of the profession and the proper functioning of the administration of justice.
>
> [186.] Other purposes of sanctioning include:
>
> a. specific deterrence of the lawyer;
>
> b. where appropriate to protect the public, preventing the lawyer from practising law through disbarment or suspension;
>
> c. general deterrence of other lawyers;
>
> d. ensuring the Law Society can effectively govern its members; and
>
> e. denunciation of the misconduct.
>
> [187.] Sanctioning must be purposeful. The factors that relate most closely to the fundamental purposes outlined above carry more weight than others.

97. To achieve these purposes there must be a proper denunciation of the conduct. The Guideline provides that these fundamental aspects are crucial to the independence of the profession and to a proper functioning of the administration of justice. Sanctions must be purposeful such that the factors that relate most closely to the fundamental purposes outlined above carry more weight than others. No one factor is greater than

any other factor and the "ultimate sanction must be measured, proportionate and reasonable."[23]

98. The Guideline provides further assistance in setting out factors for consideration in determining the appropriate sanction, as follows:

> [198.] The prime determinant of the appropriate sanction is the seriousness of the misconduct. The seriousness of the misconduct may be determined with reference to the following factors:
>
> a. the degree to which the misconduct constitutes a risk to the public;
>
> b. the degree to which the misconduct constitutes a risk to the reputation of the legal profession;
>
> c. the degree to which the misconduct impacts the ability of the legal system to function properly (e.g., breach of duties to the court, other lawyers or the Law Society, or a breach of undertakings or trust conditions);
>
> d. whether and to what extent there was a breach of trust involved in the misconduct;
>
> e. the potential impact on the Law Society's ability to effectively govern its members by such misconduct;
>
> f. the harm caused by the misconduct;
>
> g. the potential harm to a client, the public, the profession or the administration of justice that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would likely have resulted from the lawyer's misconduct;
>
> h. the number of incidents involved; and
>
> i. the length of time involved.
>
> [199.] The appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain public confidence in the legal profession may require a particular sanction regardless of the state of mind of the lawyer at the time of the misconduct.

[23] *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313 (*Alsaadi*), at paragraph 65.

99. The Guidelines also places importance on the ability of the LSA to govern the profession:

> [200.] The ability of the Law Society to govern the profession is essential to self-governance. Certain types of misconduct undermine the Law Society's regulatory function and must be strongly denounced. Such misconduct includes but is not limited to:
>
> a. failing to respond to communications from the Law Society;
>
> b. failing to be candid with the Law Society;
>
> c. failing to cooperate with the Law Society;
>
> d. breaching an undertaking to or a condition imposed by the Law Society;
>
> e. refusing to participate in Conduct Proceedings;
>
> f. inappropriate communications with the Law Society, including those that are offensive, abusive or harassing; and
>
> g. practicing law while suspended or inactive.

100. In addition to the above, a hearing committee may consider the following additional factors that may have either an aggravating or mitigating effect:

a) prior discipline record;

b) length of time the lawyer has been in practice;

c) acknowledgment of wrongdoing including self-reporting and admission of guilt;

d) level and expression of remorse;

e) level of cooperation during the Conduct Proceedings such as attendance at PHCs, adherence to the pre-hearing Rules, etc.;

f) medical, mental health, substance abuse or other personal circumstances that impacted the lawyer's conduct;

g) restitution made, whether partial or in full;

h) rehabilitation since the time of the misconduct;

i) the extent to which the lawyer benefitted from the misconduct; and

j) whether the misconduct involved taking advantage of a vulnerable party.

Analysis: Sanctioning

101. Section 72(1) of the *Act* sets out three sanctioning options:

> 72(1) If a Hearing Committee finds that a member is guilty of conduct deserving of sanction, the Committee shall either:
>
> (a) order that the member be disbarred,
>
> (b) order that the membership of the member be suspended during the period prescribed by the order, or
>
> (c) order that the member be reprimanded.

102. The Alberta Court of Appeal in *Virk v Law Society of Alberta*[24] provided further guidance on sanctioning:

> Disbarment is the most severe sanction, but it is not reserved for cases involving dishonest dealing with money, nor is it reserved for the hypothetical "worst case and worst offender". Every case is different, and comparison with other decisions is rarely decisive. The need to restore public confidence in the profession and protect the public will vary. As a result, such comparisons have limited weight in demonstrating that a sanction is demonstrably unfit. The Appeal Panel was not required to identify the most directly comparable prior case and impose a similar sanction.

103. The Guidelines provide some clarification on the distinction between disbarment and suspension:

> [190.] Disbarment is appropriate in the most serious cases where the lawyer's right to practice law must be terminated to protect the public against the possibility of a recurrence of the conduct, even if that possibility is remote. Where any other result would undermine public confidence in the integrity of the profession, the lawyer's right to practice may be terminated regardless of extenuating circumstances and the probability of recurrence. The reputation of the profession is more important than the impact of sanctioning on any individual lawyer.

[24] *Virk v Law Society of Alberta*, 2022 ABCA 2 at paragraph 40.

> [191.] Suspension is appropriate for the denunciation of serious or repeated misconduct where it is reasonable to believe that temporarily removing the lawyer from the profession will result in compliance with professional standards in the future. Aggravating and mitigating factors may be recognized in determining the length of the suspension.

104. In considering the appropriate sanction this Committee has considered the following aggravating factors:

    a) The prior discipline record of Mr. Kobylnyk.

    b) That Mr. Kobylnyk appears ungovernable in that he failed to respond to communication and cooperate with the LSA, including non-attendance at Pre-Hearing Conferences.

    c) The failure to serve clients goes beyond mere inadvertence or sloppiness and includes elements of deceit and lack of candour.

    d) While the misconduct of Mr. Kobylnyk does not to any notable degree pose a risk to the public, the misconduct does constitute a risk to the reputation of the legal profession.

105. This Committee has also considered the following mitigating considerations:

    a) Mr. Kobylnyk has expressed remorse and been apologetic for the misconduct.

    b) There is no evidence of dishonesty or trust defalcation.

    c) Mr. Kobylnyk did admit in his direct examination and cross examination to many of the citations.

    d) The character witnesses, which included a lawyer, have spoken highly of Mr. Kobylnyk's abilities as a lawyer, his trustworthiness and his personal attributes.

    e) There is no evidence that any of the impacted clients of Mr. Kobylnyk have been financially affected by the misconduct.

106. As further stated at paragraph 189 of the Guideline: "[e]ach type of sanction fulfills the dual purpose of specific deterrence for the individual lawyer and general deterrence for the profession." Disbarment is most appropriate where there is a possibility of a recurrence of the conduct. Suspension is suitable for admonishment of serious or

repeated misconduct. The fundamental question is what purpose does the imposed sanction serve? To that question this Committee would state:

a) A lengthy suspension will act as a specific deterrence to Mr. Kobylnyk that should reasonably result in his future compliance with professional standards. Furthermore, a lengthy suspension will also function as a general deterrence to other lawyers.

b) The Committee does not view the conduct as rising to a serious enough level that it will be repeated in the future and thus disbarment is not appropriate.

c) A reprimand would not be appropriate and nor would a short period of suspension given the disciplinary record of Mr. Kobylnyk and the evidence of ungovernability.

d) However, the misconduct of Mr. Kobylnyk is serious, and in some respects repeated, and a lengthy suspension is therefore warranted.

107. In arriving at the length of the suspension the Committee accepts the "step-up" principle and that "conduct deserving of sanction are cumulative and future offences will attract progressively more severe penalties."[25]

Costs

108. Section 72(2(c) of the *Act* provides this Committee with the authority to order costs.

109. The LSA sought costs of $32,141.00, which was not opposed by Mr. Kobylnyk, though he sought six months to pay. This was not opposed by LSA counsel.

Decision

110. Mr. Kobylnyk shall be suspended for a period of fifteen months, which suspension will commence on August 12, 2024.

110. Mr. Kobylnyk is ordered to pay costs of $32,141.00 by July 31, 2025.

Concluding Matters

111. 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. Kobylnyk will be

[25] *Law Society of Alberta v. Estrin*, 1992 ABCA 265.

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

112. The Committee further directs that a Notice to Profession be provided with respect to the suspension of Mr. Kobylnyk.

113. No notice to the Attorney General is required in these circumstances.

Dated January 17, 2025.

_____

Bud Melnyk, KC – Chair and Bencher

_____

Levonne Louie – Lay Bencher

_____

Sanjiv Parmar, KC - Bencher