Form 27
[Rules 6.3 and 10.52 (1)]

COURT FILE NUMBER	1603 04049
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANT	DAN BURYN
RESPONDENTS	HER MAJESTY THE QUEEN in right of Alberta, as represented by THE MINISTER OF MUNICIPAL AFFAIRS
- and -	
	THORHILD COUNTY, as represented by DENTONS
DOCUMENT	APPLICATION FOR INTERLOCUTORY RELIEF
APPLICATION BY :	**DAN BURYN**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	P.O. BOX 104 Radway, Alberta T0A 2W0 Ph. 780.975.5021
NOTICE TO RESPONDENTS:	DENTONS
	- and -
	HER MAJESTY THE QUEEN in right of Alberta, as represented by THE MINISTER OF MUNICIPAL AFFAIRS

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
MAY 11 2017
Clerk of the Court of Queen's Bench

This application is made against you. You are a respondent. You have the right to state your side of the matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date: May 19, 2017

Time: 10:00 a.m.

Where: Edmonton Law Courts

Before Whom: Justice in Special chambers

Go to the end of this document to see what else you can and when you must do it.

Remedy claimed or sought:

1. For a court order granting Interlocutory/Interim Relief;

2. To direct Denton's Counsel to add Exhibits and Authorities contained in my Affidavit supporting this Application into the Record, "Written Submissions for THORHILD COUNTY" for the Judicial Review hearing for May 19, 2017.

Grounds for making this application:

Why this application should succeed:

1. To correct the errors, mistakes and omissions from Dentons' Written Submission, this would help make better use of Court time, by providing more accurate and relevant authorities and exhibits to all parties to help decide this matter. It would provide a more effective resolution to this matter with parties correctly informed. It would prevent a very costly, unnecessary appeal by the parties involved that would take years to resolve. It would also prevent a future re-litigation of similar issues by other Municipalities or concerned parties.

2. Commissioner R. L. Barclay detailed a very procedurally fair Inspection/Inquiry process that could be implemented in Alberta to guide Municipalities and the Ministry of Municipal Affairs. The relevant Statutes of Saskatchewan (Municipal Act S.S. s. 396 and s. 397 are very similar to that of Alberta with regards to MGA Act s. 571 and s. 572 dealing with Inspections and Inquiries, respectively. These municipal act statutes regarding Inspections and inquiries are directed by the respective Public Inquires Act statutes in terms of correct legal procedures and common law principles to be used in such matters.

3. Without the interference of the "natural person powers" of our municipality by the Ministry of Municipal Affairs and especially the actions from the appointed Official Administrators, matters with the Minister could have be easily resolved prior to the completion of the Inspection Record, with a minimum of time and cost to everyone. It was absolutely necessary for Thorhild County to choose their own legal counsel to prevent this blatant "apprehension of bias" from the Ministry of Municipal Affairs in hindering and hobbling us in so many ways.

4. I am making this application, not just for our community, but several other communities and municipalities throughout Alberta to prevent this ever happening again

Material or evidence to be relied on:

a. Evidence by Sworn/Affirmed Affidavit,
b. Code of Conduct - Law Society of Alberta - 5. 1-5 - Disclosure of Error or Omission

c. Law Society of Upper Canada v. Charles David Besant,
2013 ONLSHIP 0076,

d. Law Society of Upper Canada's Rules of Professional Conduct
e. What To Do After You've Screwed Up A Brief, By Jacob Fischler

Summaries of Authorities

5.51-5 (b) Upon becoming aware that a tribunal is under a misapprehension as a result of submission made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must subject to Rule 3.3, immediately correct the misapprehension. [Law Society of Alberta - Code of Conduct]

4.01 (2) When acting as an advocate, a lawyer shall not
(e) knowingly attempt to deceive a tribunal or influence the course of justice of offering false evidence, misstating facts or law, presenting or relying upon a false affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct.
[The Law Society of Upper Canada's Rules of Professional Conduct - Excerpts of Rule 4 - Relationship to the Administration of Justice.]

"Summary:
BESANT – Appeal – Failure to Serve – Advocacy (Presenting a Party in a Misleading Way) – The Lawyer was found to have engaged in professional misconduct with respect to his representation of two clients in separate criminal matters and was suspended for six months – The hearing panel found that the Lawyer failed to serve: both clients by not properly preparing for trial; one client by not following the client's instructions regarding two potential witnesses; the other client by not seeking the client's instructions regarding his bail hearing and detention review; and by pleading "no contest" for the second client, though that client had pled not guilty and had maintained his innocence throughout – Both clients were convicted at trial, but those convictions were overturned on appeal, based on the ineffective assistance received from the Lawyer – The appeal panel: upheld the findings regarding not properly preparing for both trials and not following instructions with respect to the witnesses; set aside the finding regarding detention review and stayed further proceedings on that allegation; and upheld the finding regarding the "no contest" plea, but based on breach of the rule of professional conduct with respect to serving clients to the standard of a competent lawyer and not, in this instance, on breach of the rule against an advocate permitting a party to be presented in a misleading way – Further submissions were required on penalty and costs."- [Law Society of Upper Canada v. Besant, 2014 ONLSTA 50 (CanLII)]

Page 1 "Even meticulous litigators know the feeling of realizing they've made a crucial mistake. But an error in a
brief doesn't have to derail an entire case. Moving quickly to acknowledge a foul-up and correct it can minimize the damage it causes and get a
case back on track, attorneys say. The alternative — hoping no one notices — violates an attorney's duty of candor and can devastate a case.

"Nothing will weaken your credibility more than having the court discover that you have made a factual or legal misrepresentation," said Jack Nadler, a partner in Squire Patton Boggs LLP's global telecommunications group in D.C. "The natural assumption will be, 'Well, if you got this wrong — either intentionally or through carelessness — what else in this brief is wrong?' Nipping this in the bud before it undermines the court's greater confidence is absolutely critical." [What To Do After You've Screwed Up A BriefBy Jacob Fischler - Law 360]

Applicable Rules:

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court
(a) to cure the contravention, non-compliance or irregularity, or
(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

(2) An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity.

(4) The Court must not cure any contravention, non-compliance or irregularity unless
(a) to do so will cause no irreparable harm to any party,
(b) in doing so the Court imposes terms or conditions that will
(i) eliminate or ameliorate any reparable harm, or
(ii) prevent the recurrence of the contravention, non-compliance or irregularity,
(c) in doing so the Court imposes a suitable sanction, if any, for the contravention, non-compliance or irregularity, and
(d) it is in the overall interests of justice to cure the contravention, non-compliance or irregularity.

2.25(1) The duties of a lawyer of record include:
(a) to conduct the action in a manner that furthers the purpose and intention of these rules described in rule 1.2

4.2 The responsibility of the parties to manage their dispute and to plan its resolution requires the parties
(a) to act in a manner that furthers the purpose and intention of these rules described in rule 1.2

Orders to facilitate proceedings

4.9 If a party or the Court is not satisfied that an action is being managed in accordance with rule 4.2

4.10(1) The Court may, at any time, direct the parties and any other person to attend a conference with the Court.
(2) The participants in the conference may consider
(f) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding or otherwise meet the purpose and intention of these rules described in rule 1.2

4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly:
(a) the Court may make a procedural order;
(b) the Court may direct a conference under rule 4.10;
(c) on request under rule 4.12, or on the initiative of the Chief Justice under rule 4.13, the Chief Justice may appoint a case management judge for the action;
(d) the Court may make an order under a rule providing for specific direction or a remedy.

(3) Unless an enactment, the Court or these rules otherwise provide, the applicant must file and serve on all parties and every other person affected by the application, 5 days or more before the application is scheduled to be heard or considered,
(a) notice of the application, and
(b) any affidavit or other evidence in support of the application.

Any Irregularity complained of or objection relied on:

As outlined in my Affidavit, I outlined several examples of key evidence that the lawyer for Thorhild County has not considered for his Written Submissions and misstating key points in case law and statutes. Being directly affected by the lawyer's Written Brief, I object to his incomplete Written Submission.

How the application is proposed to be heard or considered:

To consider this matter by Affidavit Evidence and that this evidence be added to the record.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence.
You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant a reasonable time before the application is to be heart or considered.

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b

Disclosure of Error or Omission

5.1-5 (a) A lawyer must not mislead a tribunal nor assist a client or witness to do so.

(b) Upon becoming aware that a tribunal is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must, subject to Rule 3.3 (Confidentiality), immediately correct the misapprehension.

Commentary

[1] If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to Rule 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

[2] It is an obvious contravention of the rule for an advocate to lie to a tribunal. The rule applies as well, however, to an indirect misrepresentation. For example, a lawyer may not respond to a question from a tribunal in a technically correct manner that creates a deliberately misleading impression.

[3] On the other hand, a lawyer is not required to inform a tribunal of facts that should have been brought forth by opposing counsel. If it becomes apparent that the tribunal is uninformed or misinformed on a factual matter through no fault of the lawyer or the lawyer's client or witness, a lawyer is justified in remaining silent.

[4] A lawyer has a duty to correct a misapprehension arising from an honest mistake on the part of counsel or from perjury by the lawyer's client or witness. It may be a sufficient discharge of this duty to merely advise the tribunal not to rely on the impugned information.

[5] The principle applies not only to statements that were untrue at the time they were made, but to those that were true when made but have subsequently become inaccurate due to a change in circumstance. For example, it may have been represented that a personal injury plaintiff is permanently disabled. If, prior to judgment, the plaintiff's condition undergoes material improvement, the lawyer must, subject to confidentiality, convey this information to the court.

[6] Even if a matter has been judicially determined, the discovery of an error that may reasonably be viewed as having materially affected the outcome may oblige a lawyer to advise opposing counsel of the error. This may be the case notwithstanding that the appeal period has expired, since another remedy may be available to redress the mistake in whole or in part.

[7] Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw.

C

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

LAW SOCIETY HEARING PANEL

Citation: *Law Society of Upper Canada v. Charles David Besant,* 2013 ONLSHP 0076
Date: May 8, 2013
File No.: LCN52/12

BETWEEN:

The Law Society of Upper Canada, Applicant

v.

Charles David Besant, Respondent

Before: John E. Callaghan (chair)
Wendy Matheson
Jan Richardson

Heard: February 21 and 22, 2013, in Toronto, Ontario

Counsel: Jan Parnega-Welch, for the applicant
Respondent, self-represented

Summary:
BESANT – Findings of Professional Misconduct -Lawyer failed to serve his client DM by failing to properly prepare for the trial that took place - Failed to follow DM's instructions regarding two potential defence witnesses – With respect to DG, failed to serve his client DG by failing to properly prepare for the trial - Failed to seek DG's instructions in relation to waiving his bail hearing and his 90-day detention review; entered a de facto plea of guilty by pleading "no contest" to the allegations against DG, notwithstanding that DG had pled not guilty and had maintained his innocence throughout - Two decisions of the Ontario Court of Appeal ("OCA") overturning the convictions of DM and DG on the basis of ineffective assistance of the Lawyer filed in the proceedings filed and deemed persuasive to the Hearing Panel

REASONS FOR DECISION ON FINDINGS

[1] Wendy Matheson (for the panel):– By Notice of Application issued May 1, 2012 the Law Society applied for a determination of whether or not David Charles Besant (the "Lawyer") contravened s. 33 of the *Law Society Act* by engaging in professional misconduct. The allegations of misconduct against the Lawyer arise from the conduct of two criminal matters, one in respect of the client DM in 2007 and the other in respect of the client DG in 2008.

[2] Both criminal cases involved charges of sexual interference with minors. In both cases, the courts ordered publication bans in regard to information that might tend to identify the complainants or witnesses in those proceedings. This panel has also made an order to effectively continue these court orders in regard to this discipline proceeding. The Lawyer's two clients and some other people are therefore referred to in these reasons by initials.

[3] This hearing proceeded based upon a partial Agreed Statement of Facts ("ASF") and agreed documents, which were filed as evidence on consent. The Lawyer also testified and filed further documents.

[4] The agreed documents include two decisions of the Ontario Court of Appeal ("OCA") overturning the convictions of DM and DG on the basis of ineffective assistance of the Lawyer. The agreed documents also include the affidavits of DM, DG and the Lawyer, and related cross-examination transcripts, filed in those OCA appeals.

THE PARTICULARS

[5] The particulars of the Application are as follows:

With respect to DM:

1. Contrary to Rule 2.01(2) of the *Rules of Professional Conduct* ("the *Rules*"), the Lawyer failed to serve his client DM by failing to properly prepare for the trial that took place on September 7 and 25, 2007; and

2. Contrary to Rule 2.01(2) of the *Rules*, the Lawyer failed to follow DM's instructions regarding two potential defence witnesses.

With respect to DG:

3. Contrary to Rule 2.01(2) of the *Rules*, the Lawyer failed to serve his client DG by failing to properly prepare for the trial that took place on February 21, 2008 and March 4, 2008;

4. Contrary to Rule 2.01(2) of the *Rules*, the Lawyer failed to seek DG's instructions in relation to waiving his bail hearing and his 90-day detention review; and

5. Contrary to Rule 2.01(2) and Rule 4.01(2) of the *Rules*, the Lawyer entered a *de facto* plea of guilty by pleading "no contest" to the allegations against DG, notwithstanding that DG had pled not guilty and had maintained his innocence throughout.

FACTS

[6] The Lawyer was born in 1944 and was called to the Bar in 1974. He has been practising as a sole practitioner since 1976, although always in shared space with other lawyers. He testified that his practice has been about half criminal (mostly Legal Aid work) and the balance mostly family, with some real estate and estates work. The Lawyer described the volume of his practice as increasing, and said that controlling the volume was an ongoing problem. The Lawyer testified that in retrospect he conceded that his performance was less than perfect, but a lot of the problems were due to the demands of his practice.

The DM Case

[7] DM was arrested in December 2006 on three counts of sexual assault and three counts of sexual interference. The three alleged victims were siblings aged 12, 9 and 7 at the time. DM was initially represented by a different counsel. DM retained the Lawyer on or about May 31, 2007 and a Legal Aid certificate was issued on or about June 27, 2007. DM was in custody for several months before his trial. The first day of his trial took place on September 7, 2007 and the second day took place on September 26, 2007. DM was convicted at trial and received a custodial sentence.

[8] The Lawyer did not have any specific conversation with the previous counsel about the issues in the case or what the previous counsel had done for DM. The Lawyer met with DM on a number of occasions and he spoke with DM on the phone numerous times prior to the September 7, 2007 trial date. The Lawyer's client file did contain various memos to file regarding meetings and discussions with DM.

[9] DM had physical possession of the disclosure prior to the Lawyer's involvement. DM had reviewed the disclosure with CM (DM's ex-wife) and CL (DM's brother-in-law). The Lawyer received the disclosure shortly after June 12, 2007.

Contacting Potential Witnesses CM and CL

[10] DM asked the Lawyer to contact both CM and CL as potential defence witnesses.

CM

[11] The Lawyer did not take steps to interview CM after his client asked him to. He did speak to CM briefly, when he saw her in the courthouse on another matter. He had a relatively short discussion with her. His notes include telephone numbers for both CM and CL, and include notes that CL did not see a sexual assault and CM did not believe the allegations.

[12] The Lawyer gave a number of reasons why he did not seek to interview CM, though they related more to the question of whether to call her as a witness than whether to interview her.

[13] The Lawyer stated in his OCA affidavit that because CM and DM were having domestic issues, CM would not be a good witness for DM. However, the Lawyer did not seek to find out what, if any, relevant facts led CM to the belief that DM did not commit the alleged offence.

[14] The Lawyer further testified that the only thing he would accomplish in calling CM as a witness would be to buttress the Crown's case with respect to part of the complainants' narrative. He believed that CM would have corroborated part of the narrative with respect to one of the allegations. However, he admitted in cross-examination that there was no issue regarding that evidence, specifically that she and DM were both on the premises on the relevant weekend.

[15] The Lawyer also pointed to a restraining order against DM in regard to CM as a reason not to interview her, but agreed in cross-examination that he could have contacted her.

[16] The Lawyer noted that CM was on the Crown's witness list but was not called by the Crown. The trial judge, in his decision, noted that the defence had not called CM. On cross-examination by Law Society counsel, the Lawyer admitted that, in hindsight, if he had interviewed CM, he would have been in the position to call CM in rebuttal.

CL

[17] The Lawyer stated in his OCA affidavit that he did not rule out the possibility that CL might have been a helpful witness, but unfortunately CL left his household and the Lawyer was unable to locate him for trial. On cross-examination and on this hearing, however, the Lawyer testified that in his view CL's evidence was not of any significance.

[18] The Lawyer acknowledged that CL's address was in the initial disclosure package that he received, but said he might have forgotten that the address was there. On cross-examination in the OCA proceedings, the Lawyer acknowledged that he could have obtained CL's contact information through CM, as they are brother and sister. His notes from his brief conversation with CM do include contact information for CL.

Video Disclosure Statements

[19] The disclosure included videotaped statements of the complainants and other witnesses on DVD. On cross-examination in the OCA proceedings, the Lawyer agreed that the complainants' statements were the "heart and soul" of the Crown's case.

[20] Those videotaped statements were admitted as evidence at trial. The Lawyer agreed that they would be admitted without a *voir dire*. He testified in the OCA proceeding that he did not believe that he had a reasonable basis to insist on a *voir dire*. He said that in his opinion, the defence was better served by having the videos (which he had not reviewed) played in court. There is no evidence that DM instructed the Lawyer to admit the videotaped statements without a *voir dire*.

[21] The Lawyer did not view the video statements of the complainants before the commencement of trial, nor did he obtain and review a transcript. He testified that he reviewed the synopsized versions of those interviews to prepare for trial. He said that while it might have been preferable to have also watched the DVDs, he felt that he could properly represent DM.

[22] The Lawyer stated that his practice was extremely busy at that particular point in time, and that he could only get through so much.

[23] The Lawyer also said he was influenced by his assessment that the Crown's case was weak. He testified that he thought the complainants' statements were highly unusual, bizarre and extremely unlikely, and the product of a lot of leading questions. He reached this view, however, without viewing the video statements or reading a transcript.

[24] The Lawyer also noted that his client was illiterate and had memory problems, making it more difficult to have discussions with him. However, he conceded in cross-examination that his decision not to view the video statements was independent of any issue regarding DM's memory.

[25] The Lawyer also attested that he had no doubt that DM wanted a speedy trial and this influenced how he approached the trial. On cross-examination in the OCA proceedings, however, the Lawyer did not say he had advised DM that getting an early trial date could mean that the Lawyer would not have sufficient time to prepare for the trial.

[26] Before the commencement of trial, the Lawyer also did not have transcripts of the video statements, nor did he request that transcripts be prepared prior to trial.

[27] On cross-examination in the OCA proceedings, the Lawyer stated as follows about the potential impact of not viewing the videos on his ability to cross-examine:

> If you want to dot all the "i's" and cross all the "t's" and live in a perfect world, yes, I should have sat down and taken that step... but I have to live in a real world I get a limited amount of time under the tariff in terms of completing work; all right? I can't spend excessive amounts of time on a case, plus I've also explained to you that I was really busy at that period of time, and I was doing the best that I

could and, perhaps, I failed to do things that I would normally have done, but in terms of the extent of my handicap as far cross-examining is concerned, possibly. I can't answer that question. I really can't. I may have been handicapped. I may not have been handicapped.

[28] Although the Lawyer did not admit an adverse impact on his ability to defend DM at trial, the trial judge admonished the Lawyer for attempting to question a complainant about a possible inconsistency in her evidence without putting the specific prior statements to the complainant:

> Crown: In order to properly allow a witness to either acknowledge the statement that they made and then acknowledge that if there is an inconsistency, the statements needs to be properly put to the witness, and if my friend would like to do that we can certainly play the video and give her the statement or if you could - you know, I did not prepare a transcript. I don't believe my friend has one, but to offer these inconsistencies that he's suggesting in the manner that he is, I feel is improper given what he is attempting to do and where the information is coming from. You have to give the witness a chance in order to do it properly.
>
> Court: Are you using a transcript?
>
> Lawyer: Well, no, I'm relying on the notes of the officer who was present at the time of the statement.
>
> Court: Okay, then that is not fair.
>
> Lawyer: What is the alternative: to run the entire statement?
>
> Court: Well, to go to the statement, the part that you want to put to her exact words. If that takes time, so be it.

[29] On cross-examination, the Lawyer agreed that he ought to have had a transcript of the videotaped statements prepared. He stated that because of the DM case he has changed his practice in regard to the use of transcripts.

[30] In addition, the Lawyer agreed that he missed the fact that the complainants' mother's testimony at trial contradicted the videotaped statement she gave on December 5, 2006 with respect to whether CM was present during one of the alleged assaults. Specifically, in her videotaped statement, the mother stated that apart from herself, the three complainants and DM, no one else was present. At trial, however, the mother testified that during the same alleged assault, CM and CL were also present.

[31] The Lawyer further acknowledged in the OCA proceedings that in failing to review the videotaped statements, he had missed certain evidence regarding DH. DH was the complainants' mother's boyfriend. DH had moved into the complainants' household in mid-June of the summer that gave rise to the criminal charges against DM.

[32] In his OCA affidavit, the Lawyer said the following about his client's theory regarding DH as an "other suspect":

> I did not pursue the issue of [DH] as an "other suspect". I was well aware of the circumstances of [DH's] involvement in the initial disclosure. However, it was the mother who then took the children aside to talk to them and all three made allegations against [DM]. I reviewed the notes of Wayne Adams, the investigating police officer, interviewing [DH]. I agree that I did not pursue background information about [DH].

[33] On cross-examination in the OCA proceedings, the Lawyer stated that he did not focus on DH as being the culprit. Until his cross-examination for the OCA proceedings, the Lawyer had been unaware of the following information:

(a) where the Lawyer had understood that the complainants' mother had spoken with each of the complainants alone on the night that the abuse was allegedly first disclosed, DH's videotaped statement shows that DH was an active participant in waking and questioning each of the three complainants on the night in question;

(b) during his interview of DH, the investigating police officer criticized DH because he has "been touching these [siblings] in a total inappropriate manner"; and

(c) in his interview, DH described the 12 year old complainant as having feelings for DH and wanting to have a romantic relationship with him, and DH was flattered by the complainant's crush on him.

[34] In the OCA proceedings, the Lawyer acknowledged that had he meaningfully viewed and prepared typed transcripts of all of the videotaped statements, he "would have been more focused on [DH], that's for certain." He further stated that if the Crown had evidence that the offence may have been committed by someone else, the Crown had an obligation to put all the cards in front of the judge. He said both the defence and the Crown had screwed up.

[35] When asked on cross-examination if he could have been in a better position to defend DM, the Lawyer conceded that he should have been prepared with respect to the videotaped statements. The Lawyer acknowledged on cross-examination that preparation with respect to DH's videotaped statement "would have been critical."

The Court of Appeal Proceedings

[36] Following his conviction, DM retained another lawyer, Wayne Rumble, to handle his appeal to the Court of Appeal. Both the Lawyer and DM filed affidavits on the appeal, and were cross-examined on those affidavits.

[37] In 2011, the Court of Appeal allowed DM's appeal and found that the Lawyer did not

properly prepare for trial.[1] Specifically, the Court of Appeal found the following:

(a) the Lawyer conceded the introduction of the complainants' evidence by way of videotaped statements even though he had not reviewed the statements at all before the trial;

(b) the Lawyer failed to respond to a fundamental change in the complainants' mother's version of how one of the complainants disclosed the alleged sexual assault; and

(c) although DM had given the Lawyer the names of and contact information for two witnesses, CM and CL, who would testify in his favour about the events that gave rise to the criminal charges, the Lawyer did not interview these people or call them as witnesses.

[38] With respect to subparagraph 37(a) above, the Court of Appeal found (at para. 3) that as a result of the Lawyer's failure to review the videotaped statements prior to trial:

> ... he was not able to consider the best way to structure his cross-examination of the complainants. Moreover, he essentially had to "wing it" when it came to cross-examining the complainants, which is plainly inadequate in relation to the key witnesses against his client in a serious criminal prosecution.

[39] With respect to subparagraph 37(b) above, the Court of Appeal found (at para. 2) that:

> The fundamental change would have been readily apparent from viewing the video statement of the mother to the police, or even from the Crown's summary of that statement. On the record, we conclude that [the Lawyer's] failure to respond flowed from his almost complete lack of preparation for trial.

[40] With respect to subparagraph 37(c) above, the Court of Appeal found (at para. 4) that the fresh evidence established that the two individuals, CM and CL:

> ... would have been willing witnesses and would have testified in support of [DM's] position [...] The trial judge, in his reasons for judgment, drew an adverse inference against [DM] for failing to call one of these witnesses.

[41] In summary, the Court of Appeal found as follows (at para. 5):

> These three key omissions on the part of [the Lawyer] clearly flowed from failure to properly prepare for trial in the late summer after [the Lawyer] had successfully obtained a very early trial date for [DM]. The omissions are sufficiently serious that we cannot say that [DM] did not suffer prejudice. Indeed, in our view, this trial was simply not a fair trial for [DM].

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[1] *R. v. D.M.*, 2011 ONCA 41

[42] The convictions were set aside and the Crown did not seek a new trial. Accordingly, the charges against DM were stayed.

The DG Case

[43] DG was arrested in October 2007 on two counts of sexual assault and one count of sexual interference, each in respect of his step-grandchild (aged five at the time). DM referred DG to the Lawyer in October 2007. At the time of DM's referral, both DM and DG were incarcerated at the Central East Correctional Centre. A Legal Aid Certificate was issued to DG on or about November 13, 2007. DG's trial was scheduled to begin on February 21, 2008. On that day, DG pled not guilty, but a procedure was followed where he did not contest the allegations read in by the Crown. He was convicted, there was a joint submission on sentencing, and he received a custodial sentence.

Bail

[44] DG had no criminal record. He lived in a different town from the complainant and had no driver's licence or car. The Lawyer testified that he discussed the issue of bail with DG. He testified in the OCA proceeding that DG was unconcerned about bail, however, the Lawyer's own file notes of a discussion with DG in November 2007 indicate that "client believes that he will not survive incarceration due to his health issues." DG had previously been rushed to the hospital with serious medical issues. The same notes indicate that in prior years DG had twice been in the hospital with heart problems.

[45] In this hearing the Lawyer had two main submissions about DG's bail: first, that DG would not get bail without a release plan that included a suitable surety which DG had not come up with; and second, that the Lawyer had been trying to keep the issue of bail open.

[46] The Lawyer did not canvas the Crown's position with respect to release before consenting to his client's detention, nor did he request access to the bail brief from the Crown. He thought it was unnecessary.

[47] DG provided the Lawyer with the names of some potential sureties, but the Lawyer did not make significant efforts to contact them. The Lawyer regarded one person as unsuitable and indicated that his client could contact him if he had lined up a surety.

Ninety-day Bail Review

[48] The Lawyer received written notification that DG would be attending in court on January 16, 2008 for a mandatory 90 day detention review. In reply, the Lawyer wrote back that DG "waives this hearing."

[49] The Lawyer did not get instructions from DG. He waived DG's 90-day bail hearing without instructions.

[50] In the Court of Appeal, the Lawyer's position was that DG did not have a suitable release plan and therefore there was no point in having a bail hearing or a 90-day review, and

further a trial date had been scheduled for February 21, 2008. In this hearing, the Lawyer testified that it was difficult to contact his client, who was in jail. However, his legal aid bill shows that he had spoken with DG in each of the two days before the notification about the bail review.

[51] The Lawyer also said that since there was no surety it was pointless. The court would not have released DG and OLAP would not have authorized a bail review based on the merits. In cross-examination, the Lawyer also said he had a duty to get back to the Court office.

Trial Preparation

[52] The Lawyer requested the videos in early December, noting in his letter that given the early trial date he hoped that they would be available shortly. However, once again, the Lawyer did not view any of the videotaped statements of the witnesses before the trial date, but rather relied on the synopses. He conceded that these synopses bore the following disclaimer: "This is only a synopsis of a video interview, summarized for convenience. For complete details please refer to the original video and/or its transcript."

[53] The Lawyer attempted to explain his failure to view the video statements as a function of his lack of technical proficiency with computers. However, he agreed in cross-examination that his lack of computer skills did not affect his ability to view DVDs.

[54] Again, the Lawyer agreed to the admissibility of the complainant's videotaped evidence without having first reviewed it and without requesting a *voir dire*. The Lawyer also conceded the voluntariness of DG's videotaped statement without having reviewed it.

[55] The Lawyer admitted that he did not have transcripts of the videotaped evidence prepared for purposeful cross-examination at trial. He said that having a Court reporter prepare transcripts of videotaped evidence for purposeful cross-examination at trial would be his practice "in a perfect world."

[56] With respect to the entire disclosure package, when asked if he reviewed it, the Lawyer stated "I can't answer that question, no." The Lawyer stated "I reviewed the relevant portions of it. There may have been notes from police officers that I didn't go through thoroughly."

[57] The Lawyer did not request further disclosure from the Crown, including the complainant's medical reports, even though the complainant claimed to have been assaulted 99 times. The Lawyer's rationale for not requesting further disclosure from the Crown was that he has a very busy practice, he doubted that the medical reports would disclose anything about the child, and asking for medical reports sometimes better prepares the Crown's case.

[58] The Lawyer met with DG once in person prior to the trial, and a second time on the day set for the trial.

[59] The Lawyer reviewed only a very small portion of the initial disclosure with DG. He

made no notes of DG's version of events (*e.g.* that he may have accidently touched her on one day). The Lawyer explained that the primary reason for not reviewing all of the Crown disclosure with DG was because DG wanted to move the matter along as quickly as possible and because of the busy nature of the Lawyer's practice.

[60] When DG advised that his main concern was forcing the complainant to testify, the Lawyer did not advise DG that the Crown had advised of its intention to play the complainant's videotape as the complainant's evidence in chief pursuant to s. 715.1 of the *Criminal Code*.

[61] The Lawyer also did not describe to DG the special steps that can be taken to provide assistance and support for young witnesses, such as having a support person present or using a screen. His explanation for failing to explain these special steps was that, in his experience, many clients have difficulty absorbing this type of information, so it is not his general practice to go into these details.

[62] The Lawyer's evidence was that he would have explained to DG that he had a right to give evidence but that he was not obliged to do so, and it was the Lawyer's opinion that he would run a serious risk of conviction if he did not testify to deny the allegations. However, the Lawyer did not prepare DG to testify on the first day of trial. He felt there was no need because the Crown's case would take at least a day and he thought it was better to prepare after DG had heard the evidence from the Crown's witnesses.

[63] When asked "what's the point of going to trial if you are not properly prepared to go to trial?" in the OCA proceeding, the Lawyer replied:

> [Y]ou don't have to have every piece of paper from the Crown's offices to be in a position to conduct a full defense. This was a he-said, she-said thing, if I could put it that way. So it's not a particularly complicated factual situation. And for me to waste time in terms of moving the case along, to get - to the video statement and other possible disclosure that was out there, would have been negligent on my part given the fact that he wanted this matter resolved.

[64] In this hearing, the Lawyer conceded that at the start of the trial he was not fully prepared for the entire trial. He said his practice was overwhelming. He said he knew the Crown would not complete the trial that day and if she had, he would ask for it to be put over. He said his preparation was adequate.

Audio System

[65] DG was hard of hearing. The Lawyer was aware of DG's hearing difficulties early on and ordered hearing assistance for DG for the trial. The Lawyer recalls that at trial the speaker was not working adequately and, although tested, the Lawyer remained concerned with its functioning. As a result, the Lawyer requested that DG sit beside him at counsel table.

[66] On cross-examination in the OCA proceedings, the Lawyer acknowledged that although

he was aware that DG had a significant hearing problem, he proceeded to have the Crown read in the facts on the "no contest" plea when he knew that the audio equipment was malfunctioning.

[67] The Lawyer admitted on cross-examination for the OCA that he was aware that although DG could read lips some of the time, he could not read lips all of the time. In the OCA proceedings he conceded that it was possible that DG advised him on February 21, 2008 that he could not hear; however, at this hearing the Lawyer testified that he said that because anything is possible. He testified that DG's claims about his hearing were greatly exaggerated.

Trial Procedure

[68] The Lawyer has acknowledged that DG always denied any impropriety. DG consistently said he was not guilty. The Lawyer stated that throughout his retainer, DG was adamant that he was innocent and he did not waiver from this position.

[69] Prior to trial, the Lawyer and Crown exchanged proposals for a resolution, but no agreement was reached. On the morning of the trial, the Lawyer approached the Crown to see if there was any new proposal being offered. The Crown made a somewhat different proposal. The Crown had previously offered 15-18 months and now offered 15 months.

[70] The Lawyer testified that he thought this might be in DG's best interest because the Lawyer thought the case against DG was substantially stronger in comparison to the DM case.

[71] The Lawyer spoke to DG. DG maintained his innocence but the Lawyer said he could get around that by pleading not guilty. The Lawyer then told the Crown that the new proposal was acceptable, and she said that the Lawyer should get those instructions in writing. The Lawyer testified that although it is not his usual practice to do so, he obtained written instructions. He said he prepared a handwritten document and DG signed it.

[72] The handwritten document reads as follows:

> I, [DG], hereby instruct you to resolve this matter on the basis that I will not dispute the Crown's allegations regarding my conduct between Oct 1/06 and May 23/07.
>
> I understand that the Crown will ask for 15 mos less pretrial time (2:1), probation (3 yrs), 20 years in the sexual registry, firearm prohibition and DNA sample.

[73] There was some evidence before the panel that in the OCA proceedings DG disputed having signed this document. He asserted that he did sign something, but not this document.

[74] At the outset of the trial, the Lawyer made the following submission to the trial judge

regarding the procedure they were going to follow:

> Your honour, my client [DG] will be entering a plea of not guilty to count 3 on the information. My client has instructed me that he is content that the Crown read in the allegations with respect to this matter, that he will not be disputing the allegations. He understands that normally the Crown would have to call witnesses to prove their case. He is content that no witnesses be called in this matter, and he's content that – that this court will find that, based on the allegations, that he is guilty of count 3, and that there will be later a conviction with respect to these offences, or that offence, in connection with the subject charge. Mr. – I've spent a good deal of time with [DG]. So, he understands he's giving up his right to a full trial in connection with this matter. My instructions are that he wishes to resolve the matter. And he is also aware of all the further – further positions of the Crown in connection with this matter with respect to the appropriate sentence, with respect to the fact that he's going to be placed on a sexual registry in the future, and that there's going to be other requests by the Crown in connection with this matter. So, [DG] is prepared to proceed on that basis.

[75] DG then pled not guilty. The Crown adduced no evidence. The Crown read the allegations, which were neither evidence nor admissions. The trial judge did not conduct an inquiry into the voluntariness of DG's participation and his understanding of the nature and effect of the procedure.

[76] The procedure that was followed was the functional equivalent of a plea of guilty (or, in other jurisdictions, a plea of *nolo contendere*), without the protections required for a guilty plea. It was followed with the agreement of the Crown and the judge.

[77] The Lawyer testified that it was not the first time that he had followed this procedure. He testified that the procedure under s. 606(1.1) of the *Criminal Code* was not applicable because the plea was not guilty. Section 606(1) and (1.1) provide as follows:

> 606. (1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.
>
> (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
>
> (a) is making the plea voluntarily; and
>
> (b) understands
>
> (i) that the plea is an admission of the essential elements of the offence,
>
> (ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor.

[78] The Lawyer testified that it was difficult to see how DG could satisfy s. 606(1.1)(i). The Lawyer testified that in the trenches it was impracticable to plead not guilty and have a trial, and if you are incarcerated and have to wait it is not easy to get an early trial date. However, in this case the trial had been scheduled and was to start that same morning.

[79] On cross-examination, the Lawyer admitted that here the not guilty plea had the same effect as a guilty plea. Yet, the process under s. 606(1.1) was not followed.

[80] On cross-examination in the OCA proceedings, the Lawyer agreed that he had DG plead "no contest" to facts that included 99 assaults on the complainant over a period of seven months. When asked on cross-examination why he pled his client when DG was adamant that he had not assaulted her but that there may have been accidental contact on one particular day, the Lawyer said:

> I didn't agree to [the facts as read]. I didn't dispute them. (at Q. and A. 691 of the transcript)
>
> ...
>
> ...I think I probably should have been a little bit more careful in that in terms of making sure the Crown didn't refer to other incidents, but they just started reading and it went in.
>
> So I didn't have an agreement as to exactly what the Crown was going to read in. (at Q and A. 653 of the transcript)

The Lawyer admitted that he did not know what facts the Crown was going to rely on in the plea.

[81] The Lawyer testified that he made a mistake in not making sure the Crown confined the reading of the allegations and acknowledged that he could have objected. He said he did not because it made no difference given that there was going to be a joint submission on sentence.

[82] On cross-examination in the OCA proceeding, when asked whether DG would have understood that by not testifying he would in all likelihood be convicted, the Lawyer stated that he did not get written confirmation from DG because he did not think it was necessary. While conceding that DG had no criminal record and no familiarity with the criminal justice system, the Lawyer said on cross-examination that DG was "in custody with other people who know everything about the system" and "every time he talks to another inmate he is picking up information."

The Court of Appeal Proceedings

[83] Following completion of the trial and resulting conviction, DG also retained Mr. Rumble

to handle his appeal. In 2011, the Court of Appeal overturned DG's conviction and ordered a new trial.[2] The Court of Appeal addressed the following allegations in regard to the alleged ineffective assistance of counsel:

(a) failure to obtain judicial interim release;

(b) inadequate preparation;

(c) failure to ensure the adequate functioning of a supplementary audio system;

(d) failure to adhere to DG's instructions on the trial date; and,

(e) the procedure followed at the commencement of the trial.

[84] With respect subparagraph (e) above, the Court of Appeal stated that the exclusive language of the *Criminal Code* prohibits entry of a plea of "*nolo contendere*" or "no contest." However, the judge, assistant crown attorney, and the Lawyer implicitly agreed that the procedure followed on the trial date was proper.

[85] The Court of Appeal found the written instructions to be "problematic" and even if that document was signed at the time, observed that the content of the "instructions" provided no fuel for the Lawyer's claim that he had discussed with DG what is effectively a plea negotiation without a formal admission of guilt.

[86] The Court found that the proceedings that followed DG's plea of not guilty were sufficiently flawed that the conviction entered must be set aside, stating (at paras. 63; 67-70) :

> The procedure followed in this case was proposed by trial counsel for the appellant.
>
> ...
>
> After anxious consideration, I am satisfied that the procedure followed in the proceedings on February 21, 2008, caused a miscarriage of justice through procedural unfairness. The appellant's unwavering denial of guilty was sideswiped by a procedure that resulted in a de facto admission of guilty without any inquiry into voluntariness or the appellant's understanding of the nature and effect of this procedure.
>
> Neither [DG] nor [the Lawyer] ever admitted the truth or accuracy of the prosecutor's allegations. Neither acknowledged that the prosecutor was in a position to adduce credible evidence to establish those allegations. Nor could either do so. [DG] denied the allegations. The material filed to support the claim of ineffective assistance of counsel make it plain and obvious that [the Lawyer] had not even reviewed the videotaped statements that formed the core of the

[2] *R. v. D.M.G.*, 2011 ONCA 343

prosecutor's case and served as the source of the allegations the prosecutor read after [DG's] plea of not guilty.

Persons who admit their guilt should plead guilty. The plea inquiry that s.606(1.1) requires ensures that the plea is unequivocal, voluntary and informed.

Persons who deny guilt should plead not guilty and have a trial at which proper proof may be offered and its sufficiency or inadequacy assessed by the trier of fact. The cannibalized procedure followed here blurs the distinction between admissions and denials of guilt, is unauthorized and, as this case demonstrates, is capable of great mischief.

[87] The Court of Appeal summarized the governing principles on a claim of ineffective assistance of counsel, including the principle that the burden to establish such a claim is not easily discharged, and incompetence is to be determined according to a standard of reasonableness that begins from a strong presumption that trial counsel's conduct falls within the vast expanse of reasonable professional assistance.

[88] Rather than respond to each act and omission by the Lawyer from initial retainer to the final account, the Court focused (at paras. 111 to 119) on whether a miscarriage of justice occurred based on how the Lawyer conducted the case on DG's behalf:

> The failure of [the Lawyer] to apply for judicial interim release and the reasonableness of his assessment of the viability of [DG's] plan for release had no say in what occurred on February 21, 2008. The custodial status of [DG], indeed whether a failure to seek [DG's] judicial interim release reflected ineffective assistance, had disappeared into the background months before the trial date occurred.
>
> In one sense, as the respondent argues, the complaints about inadequate preparation for trial seem destined for the same refuse heap. After all, inadequate *trial* preparation is linked to counsel's conduct at *trial*, an event that never occurred here.
>
> Despite the first impression attraction of this argument, persuasively packaged by [the respondent] I am unable to say that the inadequacies of [the Lawyer's] preparation for trial were without influence on the proceedings that unfolded on February 21, 2008.
>
> The prosecutor and [the Lawyer] were unable to resolve the case before trial. They estimated that trial proceedings would require two days of court time. The dates selected for trial were February 21 and March 4, 2008. [DG] denied the allegations. When the parties arrived at the courthouse on February 21, 2008, [DG] was to enter a plea of not guilty. The prosecution's case would follow and then an opportunity for [DG] to answer.

> On February 21, 2008, the first day of what was to be a two-day trial, [the Lawyer] had not reviewed or had transcribed the video statements of the complainant and other witnesses that were the core of the prosecution's case against [DG]. Nor had he taken similar steps in connection with [DG's} videotaped interview by the investigating officer that he had earlier acknowledged was voluntary, at least for the purposes of cross-examination of [DG].
>
> [The Lawyer] had not prepared [DG] to testify as a witness in his own defence despite [DG's] repeated assertions that he wished to do so. Nor had [the Lawyer] developed any meaningful strategy to defend the case or an outline of potential cross-examination of the prosecution witnesses.
>
> As it turned out, no trial took place. We have no trial transcript to review in order to assess whether [the Lawyer's] lack of preparation made the trial unfair or contributed to an unreliable verdict. On the other hand, only the stunningly naïve among us would not connect the dots between the lack of preparation and the fortuitous turn of events that terminated the trial proceedings by a *de facto* guilty plea, a procedure of which [DG] was not fully informed.
>
> A miscarriage of justice occurred in this case. The proceedings were encumbered by procedural unfairness. The practical effect of what occurred was that [DG], who pleaded not guilty, essentially admitted the full sweep of the prosecutor's allegations that he had consistently denied since arrest. Yet none of the safeguards that we associate with either formal admissions or pleas of guilty were evident in the rush to judgment that occurred here. A hasty, ill informed *volte face* from an outright denial to a veiled acceptance of everything alleged in the blink of an eye as trial proceedings were about to begin.
>
> What occurred here also raises questions about the reliability of the conclusion of guilt that rests upon allegations untested in the crucible of cross-examination because of inadequate trial preparation by [the Lawyer]. [emphasis in original]

ANALYSIS

Effect of Court of Appeal Decisions

[89] In the circumstances of this case, there is a preliminary issue regarding the impact, if any, of the decisions of the Court of Appeal in the DM and DG matters. The Law Society does not suggest that those decisions determine the issues in this case. The Law Society submits that those decisions are not binding, but can be considered for their persuasive value, relying on *LSUC v. Groia,* 2012 ONLSHP 94 at para. 85.

[90] Consistent with this position, the Law Society did not object to the Lawyer testifying before this panel about the same matters that formed his evidence before the Court of Appeal, including explaining and disagreeing with aspects of that evidence. The only limit asserted was that he not be permitted to depart from the admissions he made in the partial ASF.

[91] This case is not the same as *LSUC v. Groia*. On the DM and DG appeals, fresh evidence was filed on the appeals, including affidavits from the Lawyer about his conduct that had been placed at issue and cross-examinations on those affidavits. The affidavits and cross-examinations from the Lawyer, DM and DG filed as fresh evidence in the Court of Appeal have all been filed as evidence in this hearing, on consent of the parties.

[92] Therefore, although the Lawyer did not seek standing to make submissions to the Court of Appeal, that court had considerable evidence from him before it made its decisions. Further, the allegations against the Lawyer were a central focus of the appeals and the appeal decisions.

[93] The Lawyer noted that *LSUC v. Groia* will be the subject of an appeal. With respect to the impact of the OCA decisions, he agreed that they have some value but the weight given should be modified by his evidence at this hearing. He also said that he was not an active participant in those proceedings (beyond the filing of his evidence) and the OCA received written not oral fresh evidence, which had an impact on the Court's ability to assess credibility.

[94] Although an argument could be made that the Court of Appeal decision should be treated as more than just persuasive, the Law Society has not proceeded on that basis. The panel has heard considerable overlapping and sometimes different evidence from the Lawyer in the hearing, which it has taken into account, as well as evidence and submissions from the Lawyer that some of the evidence from DM and DG in the OCA proceedings is incorrect and should be disregarded.

[95] In all the circumstances, this panel has not treated the Court of Appeal decisions as binding. They have been considered for their persuasive value only.

The DM Case

[96] The alleged professional misconduct in respect of DM is based upon Rule 2.01(2) of the *Rules* which requires that lawyers perform legal services to the standard of a competent lawyer. This is not the standard of perfection.

[97] The alleged failures here are two:

(a) the failure to properly prepare for the trial; and,

(b) the failure to follow DM's instructions to interview two witnesses.

[98] We find that the Lawyer did fail to properly prepare for trial due to his failure to view the video statements. They were the "heart and soul" of the Crown's case against DM, a serious case alleging sexual interference with three children. Yet he did not view them at any time prior to trial. Without viewing them, he agreed that they be admitted as evidence at the trial. He did not have nor did he request transcripts, which would have been, to some extent, a substitute if they had been available and read prior to the trial.

[99] The failure to view the videos did impair the defence at trial in a number of respects. The

cross-examination of at least one complainant was hampered, a significant inconsistency in another Crown witness's evidence was missed, as was an alternate suspect.

[100] Throughout the hearing, the Lawyer often stated that his practice was very busy, that he had many other obligations and that "you can only do so much." A busy practice is not an excuse for work not done that amounts to professional misconduct. Each client is entitled to expect that his or her case receive competent legal attention. The Lawyer's preparation was inadequate, particularly given the serious allegations and the prospect of custodial sentences, and a busy practice is no excuse. If the Lawyer did not have time to adequately prepare, he could have declined to take on the cases.

[101] Further, the Lawyer based his view about adequate preparation in part on his assessment of the credibility of the complaints and the strength of the Crown's case (more specifically, the weakness of the case) and he made this assessment without reviewing the core evidence, *i.e.*, the video statements.

[102] With respect to the two potential witnesses CM and CL, the Lawyer has admitted that he was asked to contact them and told that they could have exculpatory evidence. In the case of CM the Lawyer had numerous reasons why he might not want to call her as a witness at trial, but for the most part they did not apply to seeking an interview. He did not take steps to interview her. He did speak to her briefly when he saw her in court on another matter. That discussion confirmed that she could have exculpatory evidence but he did not follow-up.

[103] The Lawyer's first reason for not seeking to interview CM was the poor relationship between her and DG and the related restraining order. However, this poor relationship did not stop CM from talking to the Lawyer briefly as set out above, nor did the restraining order apply to the Lawyer. Further, in the brief court house conversation, CM confirmed that she did not believe that the assault had happened. Yet the Lawyer did not pursue an interview with her. The Lawyer's second reason was his belief that CM would corroborate part of the Crown's case, specifically that DM was at CM's house at the relevant time. However, the Lawyer agreed in cross-examination that this fact was not in dispute in the Crown's case against DM.

[104] In argument, the Lawyer submitted that regardless of what CM had to say, his judgment against calling her as a trial witness was appropriate. There are a number of reasons why, ultimately, a decision may have been made not to call CM as a witness at trial. In addition, the decision of whether or not to call a witness at trial is a strategic decision and depending on the circumstances should be given a wide berth. However, these considerations do not necessarily apply to the question of whether or not to interview a witness. Indeed, the process of attempting to and hopefully actually interviewing a potential witness should go a great distance to informing a decision regarding whether or not a witness should be called. Here, given the client's instructions to seek the interview because the potential witness had exculpatory evidence, the Lawyer ought to have done so, or alternatively revisited the instructions with his client. He did neither.

[105] Further, the Lawyer has admitted that, in hindsight, if he had interviewed CM, he would

have been in the position to call CM in rebuttal. Instead, that evidence was not called and the trial judge commented on the defence's failure to do so in the trial decision. While it is not always reasonable to ask counsel to anticipate the ebb and flow of a trial, and which witnesses may be needed, in this case, the client had specifically asked that the witness be interviewed well in advance of the trial.

[106] With respect to CL, the Lawyer's evidence was inconsistent. In the OCA proceedings he said that he had not ruled out the possibility that CL would be a helpful witness, but in this hearing he suggested that he did not think CL's evidence would be significant. However, since he did not interview CL, he was not in position to assume that CL would not be helpful, having been told by DG that he would be.

[107] In both proceedings, the Lawyer suggested problems in obtaining contact information for CL was a factor, yet some contact information was in his file and he made no efforts to use that information or obtain additional contact information. Having made no efforts, he cannot say he was unable to contact CL.

[108] Again, given the client's instructions to seek the interview of a witness with potentially exculpatory evidence, the Lawyer ought to have done so, or alternatively revisited the instructions with his client. He did neither.

[109] With respect to all the DM allegations (and the DG allegations) the Lawyer also submitted that the Law Society ought to have called expert evidence about the standard of practice required of a competent lawyer. While we accept that one option is to call expert evidence, we do not agree that it is required in every case where a breach of Rule 2.01(2) is alleged. In this case, the breaches alleged were of a very basic nature. It should not be necessary to call an expert to say that defence counsel should review the core disclosure against his or her client as part of trial preparation, or that instructions to interview potentially helpful witnesses should either be followed or revisited with a client.

[110] It is also persuasive that the Court of Appeal granted the appeal on the basis of ineffective assistance of counsel on findings that align with the particulars in this hearing. As noted in *LSUC v. Hartmann*, 2010 ONLSAP 1 at para. 12, before an appeal is granted on that basis there is undoubtedly a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance, as well as a requirement to establish that the ineffective assistance caused a miscarriage of justice. There is a high threshold that must be overcome before an appeal is granted on this basis.

[111] Another argument advanced by the Lawyer in respect of both cases was that he proceeded in good faith, based on his experience, which informed him about how these cases and related steps were going to turn out. This argument would have more weight if the Lawyer had taken the basic step of looking at the core disclosure to assess the case, which he did not. The Lawyer also argued that common sense should apply to the *Rules of Professional Conduct*. We agree, but do not see it as assisting the Lawyer. He further argued that there should not be the need to comply 100% of the time because all cases would become prolix. We do not agree that viewing core evidence or addressing client instructions can be foregone because it might take longer. Our professional

responsibilities are the underpinnings of a lawyer's role in the administration of justice and provide important protections for our clients.

[112] Another argument advanced by the Lawyer in respect of both cases was that affidavits of the clients should be disbelieved or not given any weight. He argued that the clients were significantly influenced by counsel in the appeal proceedings and by their own self-interest. He rightly observed that neither DM nor DG appeared before us, which would have allowed us to better assess their credibility. We have not placed any significant weight on DM or DG's evidence from the Court of Appeal. We have relied on the partial ASF, the evidence of the Lawyer and the documents.

[113] We conclude that the allegations in respect of the DM case have been established in both particulars.

The DG Case

[114] The alleged professional misconduct in respect of the DG case is also based upon Rule 2.01(2) of the *Rules* which requires that lawyers perform legal services to the standard of a competent lawyer. This is the basis for all three particulars. In addition, the last particular (the alleged *de facto* plea of guilty by pleading "no contest" to the allegations) is also based upon Rule 4.01(2).

Trial Preparation

[115] The Law Society puts forwards three failures regarding the Lawyer's trial preparation in the DG case:

1) the failure to view the video statements;

2) the failure to take appropriate steps regarding audio equipment in response to DG's hearing impairment; and

3) the failure to prepare DG to testify for the first day of trial.

[116] As set out below, we find that the failure to review the video statements amounts to professional misconduct but that the other two alleged failures relied upon by the Society do not.

[117] As with the DM case, the Lawyer did not view the video statements prior to the trial and he ought to have done so. Again, this was a sexual interference case involving a child, for which the video statements were central to the Crown's case. The main difference between the DM and the DG case, as assessed by the Lawyer, was that in the DG case the Crown's case was stronger. That assessment, made from the other disclosure, is yet another reason why it would be a fundamental trial preparation step to view the video statements.

[118] Again, the Lawyer arrived at trial without reviewing the video disclosure, nor did he request or review transcripts of the video disclosure. Since the trial did not proceed, we

do not know what impact this lack of preparation would have had, but it remains the case that failing to do this basic preparation is not acceptable in the circumstances of this case. Again, the Court of Appeal is persuasive with respect to what is expected of competent counsel. Our reasons above regarding the DM case also apply and it is not a sufficient answer to say, as the Lawyer did, that he was too busy.

[119] However, the Law Society has not proved that the steps the Lawyer took to address his client's hearing impairment were a breach of Rule 2.01(2). The Lawyer ordered an audio system and took steps in the courtroom when the audio system did not appear to be working. The Lawyer also directed us to other evidence in the documents that suggested that DG was able to hear sufficiently. Although there was some evidence in the record from the DG case in the OCA proceedings that called into question his ability to hear in court on the date of trial, we do not find it sufficient to prove a breach of Rule 2.01(2).

[120] Lastly, there is the allegation that the Lawyer failed to properly prepare DG to testify for the first day of trial. The Lawyer's answer was that he did not expect his client to have to testify on the first day, and if that had occurred he would have asked for an adjournment.

[121] The panel is troubled by the seeming lack of preparation of DG, not just because of the reliance on a potential adjournment, but because proper preparation of DG could have assisted with the cross-examination of the Crown witnesses and it seemed that the Lawyer was relying on DG to learn about aspects of the legal process through other inmates. However, on the record before us we are not satisfied that the Law Society has met its burden on this aspect of its case.

Waiver of 90-day Bail Review

[122] With respect to the bail hearing, the issue before us is not whether or not, with more effort, the Lawyer could have actually secured bail for DG. The main issue again relates to client instructions.

[123] The Law Society did argue that the Lawyer ought to have taken more affirmative steps regarding bail, such as canvasing the Crown's position and taking more steps regarding a surety. However, we do not find misconduct proved regarding those general steps. We did not have sufficient facts before us, and did not give significant weight to DG's evidence from the OCA regarding the underlying facts, a number of which were in dispute.

[124] However, with respect to the 90-day bail review in particular, there is no issue that the Lawyer wrote back to the Court indicating that DG had waived the hearing without even trying to get instructions from DG, let alone actually getting instructions. DG had not waived that right. Even the Lawyer does not suggest that DG had actually done so. While the Lawyer said it was hard to reach DG in jail, he did not even try, even though his Legal Aid records show contact from DG around the same time. Nor is an adequate response to say that the Lawyer had a duty to the Court to respond. An immediate response without any attempt to get instructions was not mandated by the Court notice.

[125] While it is understandable that the Lawyer would think ahead and consider the chances of getting bail as part of the process, it did not relieve him of the responsibility of getting client instructions before waiving a right. Here, the Lawyer did not even try, notwithstanding his knowledge that the client was concerned about dying in jail.

[126] The Lawyer also argued that the main objective had been to get an early trial, which was achieved. We do not see this as an answer to the failure to seek instructions. The panel concludes that this particular has been made out.

Procedure Followed at Trial

[127] The remaining particular is the allegation that the Lawyer breached Rule 2.01(2) and Rule 4.01(2) by having DG enter a *de facto* plea of guilty by pleading "no contest" to the allegations against him, notwithstanding that DG had pled not guilty and had maintained his innocence throughout. The Law Society relies on 4.01(2)(j) as the closest subrule, as discussed below.

[128] In his own evidence, the Lawyer emphasized that the procedure under s. 606(1.1) of the *Criminal Code* was not applicable because the plea by DG was not guilty. Notably, s. 606(1.1) provides significant protections for the accused. The court must be satisfied that the accused is making the plea voluntarily and understands the following:

i. that the plea is an admission of the essential elements of the offence;

ii. the nature and consequences of the plea; and,

iii. that the court is not bound by any agreement made between the accused and the prosecutor.

[129] Rule 4.01(9) of the *Rules* sets out the preconditions for a lawyer to enter into an agreement with a prosecutor about a guilty plea. In order to do so, the following must occur, following investigation:

(a) the lawyer must advise his client about the prospects for an acquittal or finding of guilt;

(b) the lawyer must advise the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client must be voluntarily prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client must voluntarily instruct the lawyer to enter into an agreement as to guilty plea.

[130] The Lawyer admitted that the process he followed in the DG court hearing had the same

effect as a guilty plea. Yet protections required by both the *Criminal Code* and Rule 4.01(9) were not provided. For example, the Lawyer has admitted that DG consistently maintained his innocence and there is no basis to conclude that he was prepared to admit anything at all, let alone the 99 occurrences of which he was ultimately convicted. The Lawyer specifically acknowledged that s. 606(1.1)(i) could not be satisfied in the DG case.

[131] With respect to what was read in by the Crown, the Lawyer neither reviewed it in advance nor interjected when the Crown read in the 99 counts. In his testimony, he attempted to justify both omissions by saying that, given the plea agreement, they did not matter. The Lawyer proceeded without giving weight to the court's discretion to reject the plea.

[132] The result of the procedure followed was that DG had none of the protections of a full trial, nor the protections required for a guilty plea. The handwritten instructions, which were the subject of a dispute on the evidence, do not address this problem. Even if we accept the Lawyer's evidence that this document was signed by DG before court, it does not fulfill the requirements of a process that has the same effect as a guilty plea. An accused who is adamant that he is innocent and pleads not guilty needs more, not less, protection than someone pleading guilty. Extra caution by the Lawyer was required.

[133] We recognize that both the Crown and the judge acceded to the "no-contest" procedure. The Lawyer testified that in fact this procedure was followed all the time until the Ontario Court of Appeal released its decision in the DG case. We do not have sufficient evidence in the record to conclude that it was, or was not, an accepted court practice at the time.

[134] Even if the procedure was accepted practice at the time, it was not appropriate for the DG case. To employ a process that has the same effect as a guilty plea, a competent lawyer ought to have, at a minimum, been satisfied that protections equivalent to Rule 4.01(9) were satisfied. Here, they were not and in some respects could not be satisfied in that DG maintained his innocence. The unsuitability of the process was further exacerbated by the Lawyer failing to take any steps to see that the allegations read in by the Crown were properly limited, and not, as they were, allegations of 99 counts.

[135] We agree that in effect, Rule 4.01(2)(j) is breached because it prohibits a lawyer from knowingly permitting a party to be presented in a misleading way.

[136] As with our decision regarding the DM case, we do not regard expert evidence as necessary for the DG case in the particulars where we find misconduct as set out above. We have addressed a number of the Lawyer's other arguments in our reasons regarding the DM case and will not repeat them here.

[137] It is also persuasive that the Court of Appeal granted the appeal on the basis of ineffective counsel, based upon findings that overlap with the particulars where we have found misconduct. Indeed the Court of Appeal was more critical of the Lawyer, tying his lack of preparation to the decision to embark on the "no contest" process used in court.

[138] We therefore conclude that the Lawyer has breached Rule 2.01(2) and Rule 4.01(2) in some but not all of the areas advanced by the Law Society in regard to the DG case.

CONCLUSION

[139] The panel finds that the Lawyer contravened s. 33 of the Act by engaging in professional misconduct in his representation of DM and DG in the matters referred to above. Specifically, the panel finds that all five particulars have been made out.

[140] We will now proceed to the next stage and hear from the parties on penalty.

d

APPENDIX A
THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT
EXCERPTS OF RULE 4 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

Advocacy

4.01 (2) When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

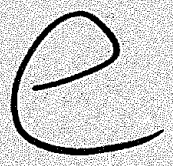
(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

(l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and



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What To Do After You've Screwed Up A Brief

By **Jacob Fischler**

Law360, Washington (April 4, 2016, 3:46 PM ET) -- Your heart pounds. Your palms sweat. You hope you're about to wake from a bad dream.

Even meticulous litigators know the feeling of realizing they've made a crucial mistake. But an error in a brief doesn't have to derail an entire case.

Moving quickly to acknowledge a foul-up and correct it can minimize the damage it causes and get a case back on track, attorneys say. The alternative — hoping no one notices — violates an attorney's duty of candor and can devastate a case.

"Nothing will weaken your credibility more than having the court discover that you have made a factual or legal misrepresentation," said Jack Nadler, a partner in Squire Patton Boggs LLP's global telecommunications group in D.C. "The natural assumption will be, 'Well, if you got this wrong — either intentionally or through carelessness — what else in this brief is wrong?' Nipping this in the bud before it undermines the court's greater confidence is absolutely critical."

Here, Law360 relates the advice of veteran attorneys on the best ways to overcome mistakes.

Come Clean

Judges and even opposing counsels understand mistakes happen and generally forgive an honest oversight. The first step in overcoming a flub is to recognize it, which should be quickly followed by taking responsibility for it, attorneys say.

"I don't see any court ever substantively penalizing you for realizing you've made a mistake and then getting it right before the court has to tell you," said Andrew Carpenter, a complex litigation partner with Shook Hardy & Bacon LLP. "I don't see any downside to that unless you were pretending to be perfect before you went into court, which I know I'm not, so it's not going to fool anybody."

However, if a legal or factual error — for example, misrepresenting a cited case as more favorable to one's argument than it actually was — is seen as an intentional effort to stack the deck, the move can do much more harm than good.

One way to allow an honest mistake to be misinterpreted as nefarious deceit is to "hide the ball" and continue hoping it passes unnoticed, said Gerald Maatman, an employment and appellate partner with

Seyfarth Shaw LLP. Instead, it's important for attorneys to let opposing counsel and the judge know as soon as possible that they have made a mistake and are working to correct it as quickly as possible, he said.

"Failure to do that dooms an appeal because once a court identifies that and you have failed to own up and correct the mistakes, more often than not you're going to lose the appeal," Maatman said. "If your adversary or your court [finds the mistake first], at best you're a sloppy brief writer and at worst you've taken liberties with the record."

And any inaccuracy in a brief requires immediate action, said James K. Langdon, a trial lawyer and partner with Dorsey & Whitney LLP in Minneapolis.

"Your best bet is to come clean as quickly as possible," James Langdon said

In addition to the judge and opposing counsel, clients must also be notified that a mistake has been made as soon as possible.

Follow the Local Rules

Once attorneys realize they have messed up something important in a brief, they must move to correct it. But different courts have different rules for how to that can be done.

"The first step is making sure you understand the rules of the court and how to go about fixing the brief," said Julie Langdon, a senior associate with Chicago intellectual property boutique Dunlap Codding.

Often, judges will allow renewed motions, particularly at the dismissal or summary judgment stages, said Brian Wolfman, the co-director of Stanford Law School's Supreme Court Litigation Clinic. In other cases, the best procedural action might be a formal letter to the judge. What's important though, is that action is taken to make the faulty brief accurate.

If a particular court does not allow corrected briefs, or if a misstep is not noticed until too late in the process, there are usually other ways to make a correction, whether that's in a reply brief or as late as oral argument.

"Even if you can't file an amended version, it's always better to blow the whistle on yourself," Carpenter said. "It's never too late to do a mea culpa, which is a hell of a lot better than trying to fake it."

Judges are likely to be sympathetic to such a situation, as long as it is a genuine mistake, for no other reason than it wastes their time to consider improper filings, according to Julie Langdon.

"Most often, the judge is going to let you do that," Julie Langdon said. "They don't want to read something that is not 100 percent accurate."

Especially for more minor errors, a corrected brief may be unnecessary, attorneys say. Instead, a conversation with legal adversaries can go a long way.

"This is where it's helpful to have developed a good working relationship with your opposing counsel," James Langdon said.

Keep Corrections Focused

An amended brief is not the place to introduce entirely new arguments, lawyers say. Likewise, while Carpenter said he "errs the hell on the side of disclosure," not every typo or misspelling requires a formal correction. Instead, corrections should be filed only when the original brief contained something inaccurate.

"You definitely should not be filing a corrected brief to change your argument in any way or to change the facts you've presented in any way," Julie Langdon said. "It should really, truly only be used to fix misrepresentations, inaccuracies."

At the same time, attorneys who do find a mistake that requires a correction should ensure they review the rest of the brief for other possible errors that warrant amendment so that only one corrected brief need be filed, she added.

Others counsel to avoid filing mistakes in the first place through careful review before filing. Attorneys should proofread their work, of course, but it is also helpful to have someone unfamiliar with the case read a brief before it enters a court record.

After several drafts in different briefs on the same case, someone's eyes can easily glaze over their mistakes. But handing off to a colleague who must read the brief more slowly helps guard against sloppy typos and helps ensure the writing flows logically and accurately.

"It's critical to have someone with an independent eye go back and read the brief, see if it holds together," Nadler said.

--Editing by Jeremy Barker and Edrienne Su.