2024 LSBC 35
Hearing File No.: HE20230010
Decision Issued: July 19, 2024
Citation Issued: June 15, 2023

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

JEREMY WILLIAM DAVID MILLS

RESPONDENT

DECISION OF THE HEARING PANEL ON A JOINT SUBMISSION PURSUANT TO RULE 5-6.5

Written Materials:	March 1 and April 22, 2024
Panel:	Krista L. Simon, Chair Alykhan Alladina, Public representative Aleem Bharmal, KC, Bencher
Discipline Counsel:	Mandana Namazi
Counsel for the Respondent	Richard Neary

INTRODUCTION

[1] On June 15, 2023, the Law Society of British Columbia issued a citation (the "Citation") against Jeremy William David Mills. It seeks a finding of professional misconduct or incompetent performance of duties, pursuant to section 38(4) of the *Legal Profession Act (*the *"Act")*.

[2] The Respondent admits that, on June 15, 2023, he was served with the Citation through his counsel, and waived the requirements of Rule 4-19 of the Law Society Rules (the "Rule(s)").

CITATION

[3] The allegations against the Respondent are set out in the Citation as follows:

1. In or between approximately April 2016 and October 2017, in the course acting for KM (the "Client"), in connection with a criminal law matter (the "Criminal Trial"), you failed to provide the quality of service required of a competent lawyer in a similar situation, contrary to one or more of rules 2.1-3, 3.1-2, and 3.2-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*"), including by failing to do some or all of the following:

    (a) adequately prepare for the Criminal Trial;

    (b) sufficiently document your preparation, discussions, or instructions received;

    (c) give the Client appropriate, accurate, and timely legal advice;

    (d) ensure that the Client was equipped with necessary information in order to make informed decisions and provide instructions;

    (e) understand the material legal and evidentiary issues in the Criminal Trial;

    (f) take all appropriate steps to defend the Client's interests before and during the Criminal Trial;

    (g) adequately advocate for the Client and protect her right to a fair trial;

    (h) appreciate the legal effects of admissions made at the Criminal Trial;

    (i) provide quality work to avoid delay and unnecessary costs; and

    (j) recognize that you were ill-prepared to assume conduct of the defence of the Client's case at the Criminal Trial.

    This conduct constitutes professional misconduct or incompetent performance of duties, pursuant to section 38(4) of the *Legal Profession Act*.

[4] By way of joint written submissions dated February 29, 2024, the parties jointly submitted an agreed statement of facts ("the ASF") and the Respondent's admission of a disciplinary violation and consent to a specified disciplinary action pursuant to Rule 5-6.5 of the Rules (the "Joint Submission").

[5] As outlined above, allegation 1 of the Citation alleges that the Respondent failed to provide the quality of service expected of a competent lawyer by failing to do some or all of the considerations listed from (a) through (j).

[6] The Law Society is *not* pursuing allegations 1(a), (d), (f) and (j) of the Citation in the Joint Submission.

[7] In the ASF, the Respondent admits, and the Law Society agrees, that he committed professional misconduct in relation to sub-paragraphs (b), (c), (e), (g), (h) and (i) of the Citation.

[8] The parties jointly ask that the Respondent be sanctioned in accordance with the joint proposal:

(a) that the Respondent be suspended from the practice of law for six (6) weeks, commencing on the first day of the month following the date the hearing panel's decision is issued, or such other date as the parties may agree to in writing or as the panel may order if the parties cannot agree;

(b) that the Respondent be required to complete 23 credits of relevant continuing professional development ("CPD"), within six (6) months of the date of the order of the hearing panel (in addition to the 12 credits normally required of lawyers per year), as approved by the Law Society;

(c) after his suspension, that the Respondent practise law with at least one other criminal lawyer approved by the Law Society, for a period of three (3) years from the date a hearing panel accepts the joint proposal; and

(d) that the Respondent pay costs of $2,500 to the Law Society, payable within six (6) months of the hearing panel's order or such other date as the parties may agree to in writing.

ISSUES

[9] The issues the Panel must determine are as follows:

(a) Should the Panel accept the Respondent's admission of disciplinary violation and find that the he committed acts of professional misconduct, pursuant to section 38(4) of the *Act*?

(b) Should the Panel impose the jointly proposed disciplinary action?

(c) Should the Panel order the agreed costs?

[10] For the reasons that follow, the Panel finds that the Respondent committed acts of professional misconduct, pursuant to section 38(4) of the *Act,* and accepts the proposal set out in the Joint Submission, including regarding disciplinary action and costs.

PRELIMINARY MATTERS

[11] The civil standard of proof applies to discipline proceedings. The Law Society carries the burden to establish on a balance of probabilities the facts that it alleges constitute professional misconduct: *Foo v. Law Society of British Columbia,* 2017 BCCA 151.

[12] When a matter proceeds by way of joint submission, pursuant to Rule 5-6.5, a hearing panel is prohibited from diverging from the joint submission on disciplinary action unless it finds that the proposed penalty is contrary to the public interest in the administration of justice: Rule 5-6.5(3)(b); *Law Society of BC v. Lang*, 2022 LSBC 4 at paras. 27 to 28.

[13] This limitation reflects the principles set out by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 10 to 11 which support deference being given to joint submissions. These principles include: "... certainty for the parties negating the negative aspects involved in requiring witnesses to testify; and creating efficiencies in the system": *Lang* paras. 20 to 27.

[14] The Supreme Court of Canada articulated the test for considering a joint submission as follows in *Anthony-Cook* at paras. 33 and 34:

> [33] In *R. v. Druken*, 2006 NLCA 67, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is "so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system." And, as stated by the same court in *R. v. B.O. 2*, 2010 NLCA 19, at para. 56 (CanLII), when

> assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".
>
> [34] In my view, these powerful statements, capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. …

[15] Accordingly, a high threshold is imposed before a joint submission can be rejected by a panel.

BACKGROUND AND CIRCUMSTANCES GIVING RISE TO THE CITATION

[16] The Respondent was called to the bar of Ontario in October 2005 and in British Columbia in August 2006.

[17] From August 1, 2006 to May 31, 2020, the Respondent practised law as a sole practitioner in Victoria, British Columbia. Since June 1, 2020, the Respondent has worked with the same criminal lawyer at a law firm in Victoria, British Columbia.

[18] The Respondent practises primarily in the area of criminal law.

The trial and appeal

[19] The circumstances giving rise to the hearing arise from the Respondent's conduct while representing a client, KM in a criminal law matter. There is no dispute as to the facts in this matter. The ASF is extensive and includes documents, reasons and transcripts from the Criminal Trial.

[20] KM's daughter died on September 16, 2015, from a Zopiclone overdose. Shortly after the death, KM admitted to committing the acts that caused her daughter's death. At trial, KM made a formal admission that she caused her daughter's death by feeding her a lethal quantity of prescription sleeping pills mixed with yogurt before smothering her.

[21] A jury trial was held in Victoria, British Columbia between September 11, 2017, to October 4, 2017. The main issues at trial related to KM's mental state, and specifically: (a) whether KM had the requisite intent for murder; and/or (b) whether KM was not

criminally responsible by reason of mental disorder under s. 16 of the *Criminal Code* (the "NCR Defence").

[22] The theory of the defence was that KM committed the act that caused her daughter's death when she was in a profoundly disordered mental state.

[23] At KM's election, the trial proceeded in two stages. The first stage of the trial concerned KM's liability for the offence of first-degree murder (the "First Stage"); the second stage of the trial concerned the NCR Defence (the "Second Stage").

[24] The defence called all its witnesses at the First Stage, including a forensic psychiatrist and KM's treating psychiatrist. The defence relied on the psychiatric evidence at the First Stage to plant a reasonable doubt about both whether KM caused her daughter's death with the requisite intent for murder, and even if she did, whether the murder was planned and deliberate.

[25] KM relied on the evidence of both doctors to support the NCR Defence. KM did not testify at either stage of the trial. The defence did not call any additional evidence at the Second Stage.

[26] On October 3, 2017, the trial judge provided instructions to the jury in relation to KM's liability for first degree murder. The following morning, on October 4, 2017, the jury returned a guilty verdict.

[27] On the afternoon of October 4, 2017, the Crown and defence gave their closing addresses to the jury on the NCR Defence, and the trial judge instructed the jury on the NCR Defence. After deliberating for less than an hour, the jury declined to accept the NCR Defence and KM was convicted of first-degree murder. The trial judge then entered the guilty verdict and imposed life imprisonment without parole eligibility for 25 years, which is the mandatory minimum sentence for first-degree murder.

[28] KM appealed her conviction to the Court of Appeal of British Columbia. KM's grounds of appeal were as follows:

(a) that the Respondent provided ineffective legal assistance that gave rise to a trial that was unfair in fact and in appearance; and

(b) that the in-court conduct of one of the jurors gave rise to a reasonable apprehension of bias on the part of that juror and a corresponding failure of the appearance of justice.

[29] The appeal was heard over the course of several months, with the Respondent testifying before the Court of Appeal on two occasions.

[30] On June 30, 2021, the Court of Appeal overturned KM's conviction for two main reasons:

(a) first, the court accepted that KM received ineffective assistance of counsel. The judgment discusses several issues with respect to the conduct of the Respondent at KM's trial; and

(b) second, the court determined that the conduct of a juror during the trial gave rise to a reasonable apprehension of bias.

[31] The Court of Appeal ordered that a new trial be conducted.

[32] On January 23, 2023, with the assistance of new counsel, KM pled guilty to the second-degree murder of her daughter and received a sentence of life in prison with no eligibility for parole for ten years. The Crown and the defence made a joint submission agreeing to KM being eligible for parole after ten years.

Errors at trial

[33] The Respondent's errors at trial fall into three main categories: (a) admissions of fact made on behalf of KM, (b) expert testimony, and (c) failures of advocacy. The errors, and resultant consequences, were significant.

[34] At the outset of the trial, the Respondent made a number of factual admissions on behalf of KM in a document called Admissions of Fact dated August 30, 2017. The Respondent failed to appreciate the legal effect of the Admissions of Fact, including the impact of the admissions on available defences for KM.

[35] During the trial, the Respondent took no steps to withdraw the Admissions of Fact. Instead, he continued to argue for a full acquittal. The Respondent later acknowledged to the judge that this was not realistic.

[36] The Court of Appeal found that:

(a) KM did not receive, but "was entitled to reasonable professional assistance sufficient to enable her to make an informed decision about whether to admit liability for the offence of manslaughter"; and

(b) "[the Respondent] did not know the legal effect of making this admission on [KM's] behalf".

[37] As a result, the Court of Appeal found that KM could not make an informed decision on whether to admit liability for the lesser included offence of manslaughter.

This error contributed to a proceeding that was procedurally unfair and, coupled with the other issues discussed in the judgment, undermined both the fairness of the trial and the appearance of trial fairness.

[38] On October 26, 2022, the Respondent was interviewed as part of the Law Society investigation (the "Interview"). The Respondent stated that in drafting the Admissions of Fact his focus was on including facts that supported the NCR Defence, and he admitted that he did not spend much time thinking about all the implications of second-degree murder or manslaughter as the Crown's case was "so strong" for first-degree murder. The Respondent admits that he overlooked the specific admission of manslaughter and that this was an "*error*" on his part.

[39] Regarding expert testimony, the Court of Appeal found:

(a) that KM was provided with incorrect legal advice regarding the effect of the Crown's cross-examination of the experts and what became admissible as a result, and therefore, KM's decision not to testify was uninformed; and

(b) that KM was not provided any advice regarding whether to testify at the second phase of the proceedings and, again, as a result she could not make an informed decision regarding whether to testify.

[40] The Court of Appeal further determined that:

(a) KM received incorrect legal advice regarding the necessary evidentiary foundation for the expert opinions to be considered by the jury; and

(b) in the absence of correct legal advice on this issue, it was "difficult to see how" KM "could have made an informed decision about whether or not to testify".

[41] At the Interview, the Respondent stated that his trial strategy from the outset was to avoid KM testifying. At the Interview, the Respondent also stated that the guilty verdict did not have any impact on whether KM should testify at the Second Stage, as he had anticipated the guilty verdict. He did not discuss with KM the costs and benefits of testifying.

[42] As a result, coupled with the incorrect legal advice the Respondent provided to KM with respect to the admissibility of her statements to the expert witnesses, KM could not make an informed decision about whether to testify during the second stage to support the expert opinions.

[43] The Respondent failed to adequately, or at all, consider the necessity of KM testifying at the Second Stage, or the implications of a failure to testify at that stage of the trial.

[44] The Court of Appeal found that the Respondent demonstrated deficiencies in his understanding of the rules of evidence and their application to the case, as well as failures in his advocacy skills. The Court of Appeal commented on the Respondent's deficiencies in respect of failure to document various pre-trial issues, the opening and closing addresses, use of expert evidence, admissibility of statements made by KM, and admissibility of demeanour evidence.

[45] Some specific examples include:

(a) At trial, the Respondent failed to ask that an expert report, admitted in redacted form at the First Stage, be fully disclosed to the jury at the Second Stage. Before the Court of Appeal, the Respondent testified that this failure was an oversight on his part.

(b) The Respondent did not fully document his discussions with KM or receive key instructions from her in writing. For the Admissions of Fact, the Respondent did not get a written letter of instruction from KM outlining her agreement with the admissions she was making. The Respondent acknowledged that he should have taken more notes of his interactions with KM and that his practice up to 2017 with respect to obtaining written instructions was disorganized and inconsistent. The Respondent, by failing to document his discussions with KM, including with respect to her decision not to testify, did not follow best practices.

(c) The Respondent provided an inadequate closing submission on the NCR Defence. This closing address took up two pages of the trial transcript. The Court of Appeal described the Respondent's closing address as wholly inadequate because he made "no attempt to marshal the evidence" related to "the factual foundation upon which the expert opinions rested." The Court of Appeal concluded that the Respondent's "failure of advocacy reflected in the closing address given on behalf of [KM] at the second stage of the trial established the performance component of the test" for ineffective assistance of counsel.

LEGAL PRINCIPLES

Test for professional misconduct

[46] Although "professional misconduct" is not a defined term in the *Act*, the Rules, or the *BC Code*, the test for whether conduct constitutes professional misconduct was set out in *Law Society of BC v. Martin*, 2005 LSBC 16.

[47] In *Martin,* the Court stated the test as "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members": *Martin*, para. 171.

[48] The *Martin* "marked departure" test is an objective test. It has been applied in many subsequent cases, and was affirmed by the British Columbia Court of Appeal in *Foo.* In *Foo*, the Court went on to confirm that the test should focus on the specific nature of the conduct at issue and involve an examination of the conduct in the context and circumstances in which it occurred.

[49] The consideration for the Panel is whether the Respondent failed to provide the quality of service required of a competent lawyer contrary to rules 2.1-3, 3.1-2, and 3.2-1 of the *BC Code* as alleged in sub-paragraphs (b), (c), (e), (g), (h) and (i) of the Citation. Noting the findings of the Court of Appeal, the Panel finds, as discussed further in the decision below, that the Respondent's admitted failings were contrary to the relevant *BC Code* provisions as set out in the relevant sub-paragraphs of the Citation. Secondly, the Panel finds that conduct fell markedly short of the expected standard and was a marked departure from conduct expected of lawyers.

Assessing the Respondent's professional misconduct

[50] A review of the *BC Code* and commentary assist in assessing the alleged misconduct.

[51] Rule 2.1-3 of the *BC Code* provides in part that:

> (a) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.

> …
>
> (e) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.
>
> (f) It is a lawyer's right to undertake the defence of a person accused of crime, regardless of the lawyer's own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client's instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.
>
> …

[52] Rule 3.1 of the *BC Code* provides a definition for a "competent lawyer" (3.1-1), and states that a lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer (3.1-2).

[53] Pursuant to rule 3.1-1 of the *BC Code,* a competent lawyer is one who, among other things: communicates at all relevant stages of a matter in a timely and effective manner; recognizes limitations in their ability to handle a matter or some aspect of it and takes steps accordingly to ensure the client is appropriately served; and manages their practice effectively.

[54] The commentary to rule 3.1-2 of the *BC Code* notes that a client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf, and that competence is founded upon both ethical and legal principles.

[55] Rule 3-2.1 of the *BC Code* provides that:

> A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

[56] The commentary to rule 3-2.1 provides:

Commentary

[1] This rule should be read and applied in conjunction with section 3.1 regarding competence.

[2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] A lawyer has a duty to communicate effectively with the client. […]

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

…

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

> …
>
> (k) providing a client with complete and accurate relevant information about a matter;
>
> …

[57] Providing quality and appropriate legal services is at the core of a lawyer's duty to their client. Failing to provide a sufficient level of service to one's client is a serious matter and strikes at the heart of the public interest in the administration of justice and the trust the public will have in lawyers: *Law Society of BC v. Hart,* 2014 LSBC 17.

[58] Failing to keep a client reasonably informed and responding to communications, and failing to provide the client with complete and accurate information amounts to professional misconduct: *Law Society of BC v. Mctavish*, 2018 LSBC 2.

[59] In *McTavish*, a hearing panel held:

> … Ensuring quality and appropriate legal services are provided to the public goes to the heart of the Law Society's mandate to regulate the profession and uphold and protect the public interest in the administration of justice. One of the primary functions of a lawyer is to provide competent legal services to the members of the public who have hired a lawyer. Accordingly, the sanction imposed for this type of misconduct should send a clear message to the profession to deter other lawyers from providing sub-standard services to clients, which will also demonstrate effective regulation of the profession to the public, thereby instilling confidence in the integrity of the profession.

[60] The public must be able to trust that lawyers will act to serve the best interest of their clients, and in this case, the Respondent failed to do so in many ways. The Respondent's failure to provide quality of service to KM was a marked departure from the standard of conduct expected of counsel.

JOINTLY PROPOSED SANCTION

General principles

[61] When it comes to regulation and discipline, the Law Society's mandate is fairly described in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 at paras. 9 and 10:

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the

> public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> … In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members.

[62] From that decision, arose a list of 13 factors (known as the "*Ogilvie* factors"), which were later consolidated in *Law Society of BC v. Dent*, 2016 LSBC 5 as follows:

(a) nature, gravity and consequences of conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession including public confidence in the disciplinary process.

Application of principles

Nature, gravity and consequences of conduct

[63] The Respondents failings were serious and related to the following core professional obligations:

(a) to properly document preparation, discussions, and instructions;

(b) to give appropriate, accurate, and timely legal advice;

(c) to understand material legal and evidentiary issues;

(d) to adequately advocate for the client and protect her right to a fair trial;

(e) to appreciate the legal effects of admissions; and

(f) to provide quality work to avoid delay and unnecessary costs.

[64] The admitted failings impacted KM, the trial process, the legal system and the public's confidence in the legal profession and the administration of justice. This is an aggravating factor.

Character and professional conduct record of the respondent

[65] The Respondent has no prior professional conduct in his professional conduct record and he has a history of representing marginalized clients.

Acknowledgment of the misconduct and remedial action

[66] The Respondent admits that his conduct constitutes professional misconduct and he made admissions early on and was cooperative through the investigative process.

[67] Since the Criminal Trial, the Respondent has made some notable changes to his approach to the practice of law. He no longer accepts work involving child victims; he has changed his practice with respect to documentation of discussions and client instructions; and he practices with another criminal lawyer from whom he can seek professional advice.

Public confidence in the legal profession including public confidence in the disciplinary process

[68] Members of the public who engage lawyers to assist and advise them on legal matters are entitled to expect competent, prompt, and professional service. Conduct such as that committed by the Respondent undermines public confidence in the ability of the legal profession to operate in a competent, effective, expeditious, and cost-effective manner. The public will have more confidence in the profession and the disciplinary process if the sanction is proportionate to the misconduct, and is fair and reasonable in all of the circumstances: *Law Society of BC v. McTavish,* 2018 LSBC 25 at para. 62.

[69] General deterrence is a legitimate and central objective of the disciplinary process. The Court of Appeal in *McGuire v. Law Society of British Columbia*, 2007 BCCA 442 at para. 8, upheld a hearing panel's decision in which the panel stated:

> … protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members. 'Don't even think about it.'

[70] The sanction imposed on the Respondent in this case must ensure that the Respondent is held accountable for his actions but must also deter others from similar

misconduct. This will aid in maintaining the public's confidence in the ability of the Law Society to regulate the conduct of its members.

Sanctions imposed in similar cases

[71] Two decisions were offered as illustrative of significant sanctions:

(a) In *Law Society of Upper Canada v. Besant*, 2013 ONLSHP 76 (findings); 2013 ONLSHP 189 (penalty); 2015 ONLSTA 16 (appeal) a criminal lawyer failed to follow instructions and to properly prepare for a trial. The lawyer was suspended for six months (reduced to five months on appeal), and was ordered to participate in a practice review.

(b) In *Law Society of BC v. Goldberg*, 2007 LSBC 3 (F&D), 2007 LSBC 40 (*"Goldberg DA"*), 2008 LSBC 13 (sanction upheld on review) a criminal lawyer made in-court allegations against another lawyer with no evidentiary foundation, demonstrated an inadequate knowledge of the relevant law and its application, and a lack of skills to effectively represent his clients' interests. The lawyer had a prior conduct record. He was suspended for three months and put under a practice supervision agreement.

[72] Both decisions are noted to involve more senior lawyers with prior serious discipline histories.

[73] In this case, the Joint Submission points to several mitigating factors weighing in favour of a less onerous sanction in respect of the Respondent's misconduct:

(a) the Respondent has expressed remorse for his misconduct;

(b) the Respondent admitted the misconduct at an early stage of the process;

(c) the Respondent no longer practises as a sole practitioner, and practises at a law firm where he can receive professional advice from another criminal lawyer;

(d) the Respondent has changed his practice with respect to documenting discussions with clients;

(e) the Respondent does not have a prior professional conduct record;

(f) the file that is the subject matter of the Citation was the first occasion where the Respondent was lead counsel on a murder case and the first case the Respondent worked on involving a death within a domestic context;

(g) shortly after the conclusion of the Criminal Trial, the Respondent decided of his own volition to no longer accept work on files involving child victims;

(h) the Respondent was struggling emotionally and mentally with the circumstances of the underlying file, and has sought professional assistance in that regard; and

(i) other than the underlying file, the Respondent has a history of earnestly and diligently representing marginalized clients.

Point of clarification

[74] Since the Hearing was conducted in writing and there was no appearance in-person, the Panel did not have the opportunity to question the parties directly on their Joint Submission. On April 16, 2024, the Panel issued a Memorandum to the Parties (the "Memorandum"), seeking clarification on some specific points arising from the Joint Submission.

[75] The Panel's inquiries related to the Respondent's practice proposal that he practice law with at least one other criminal lawyer approved by the Law Society, for a period of three years. Specifically, the Panel sought clarification as to the specific nature of the arrangement and what it is meant to accomplish.

[76] The arrangement is not meant to be practice supervision, but rather an informal, peer relationship, where advise and support are available as needed. The Respondent is not meant to practice as a sole practitioner, and he should have a specific person to consult with should future personal or legal/ethical issues arise. The condition is meant to assist in promoting rehabilitation of the Respondent, while protecting the public.

[77] The Panel is satisfied with the clarification provided and it does not change the veracity of the Joint Submission.

Summary

[78] The Panel finds the Respondent's conduct during the course of his preparation and conduct of the trial for his client KM to be a marked departure from conduct expected of lawyers. His conduct is in stark contrast to the standards of practice that members of the public should expect of a member of the bar.

[79] The Respondent's admitted conduct involved several critical failures. There was a lack of sufficient documentation regarding preparation, discussions, and instructions received. Legal advice provided to KM by the Respondent was neither appropriate nor

timely. Further, the Respondent failed to grasp the essential legal and evidentiary issues pertinent to KM's trial, and did not adequately advocate on behalf of KM during the trial. There was also the Respondent's failure to recognize the legal implications of admissions made during the trial. Taken together, the Respondent's conduct jeopardized KM's right to a fair trial.

[80] The overriding purpose of disciplinary action is to ensure the public is protected and to maintain the public confidence in the legal profession. At the time of the misconduct in question, in 2017, the Respondent was a reasonably new lawyer, but not so junior that we would expect mistakes and missteps of the nature of his described misconduct. Accordingly, a significant sanction is warranted.

DECISION AND ORDER

[81] Upon consideration of the facts and law presented in the Joint Submissions, the Panel has concluded that the Respondent has committed professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[82] Upon careful review of the Joint Submission and ASF, the Panel finds no valid reason to deviate from the joint proposal of the parties. The admissions and agreed facts, along with the proposed sanctions are reasonable in the circumstances. The proposed sanction meets the objectives of protecting the public, instilling confidence in the profession and administration of justice, and deterring others from engaging in such conduct.

[83] Accordingly, the Panel makes the following order, as sought in the Joint Submission:

(a) an order under s. 38(5)(d) of the *Act*, suspending the Respondent from the practice of law for a period of six (6) weeks commencing on the first day of the first month following the date the Panel's decision is issued, or such other date as the parties may agree to in writing or as the Panel may order if the parties cannot agree;

(b) an order under s. 38(5)(c) that the Respondent be required to complete 23 credits of relevant CPD within six (6) months of the date the Panel's decision is issued (in addition to the 12 credits per year normally required of lawyers), as approved by the Law Society;

(c) an order under s. 38(5)(f) that after his suspension is completed, the Respondent practise law with at least one other criminal lawyer approved by

the Law Society, for a period of three (3) years commencing on the date the Panel's decision is issued; and

(d) an order that the Respondent pay costs to the Law Society in the amount of $2,500, inclusive of disbursements, payable within six (6) months of the date the Panel's decision is issued, or such other date as the parties may agree to in writing.