

Allegations of ineffective assistance of counsel against Law Society duty counsel dismissed

Disciplinary Hearing | Litigation | Litigation & Dispute Resolution

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Lawyers facing disciplinary proceedings before the Law Society of Ontario may have duty counsel appointed to represent their interests. A Divisional Court decision shows that duty counsel have the same obligations of competence as any other lawyer retained to act in a matter and may be subject to the same scrutiny for whether their representation of the lawyer was effective in the circumstances: *Deokaran v. Law Society of Ontario*, 2023 ONSC 1702 (CanLII).

In the discipline proceedings at issue, the Law Society alleged that the lawyer had engaged in professional misconduct in failing to reply promptly and completely to the Law Society's communications in connection with two separate investigations. There was no dispute that the Law Society's investigator had sent the lawyer a number of letters requesting information in the two investigations, and set a final deadline to respond for 11 June 2018.

The lawyer's position was that she had provided a comprehensive response to the Law Society by letter which she personally delivered to the Law Society mailroom on the 11 June 2018 deadline. This position was advanced in an affidavit signed by the lawyer and dated 22 August 2018, with a copy of her response materials attached as an exhibit.

In response, the Law Society filed reply material on 23 August 2018, including evidence about its mailroom practices and copies of e-mail exchanges between the investigator and the lawyer. The Law Society's position was that the lawyer did not deliver her response on 11 June 2018, and that the first time the lawyer claimed to have delivered the material was actually when she served her affidavit on 22 August 2018.

The Law Society further took the position that even if the response was delivered on 11 June 2018, the lawyer's response was inadequate and did not amount to a defence to the allegations.

At the discipline hearing conducted on 24 August 2018, the lawyer was represented by duty counsel. At the commencement of the hearing, duty counsel consented to the filing of the Law Society's reply evidence and confirmed, on the record and in the lawyer's presence, that the lawyer had instructed him to proceed and was not requesting an adjournment.

The primary dispute at the hearing was factual, namely did the lawyer deliver her response to the Law Society mailroom on 11 June 2018? The Hearing Division heard evidence on this issue and rejected the lawyer's defence. The adjudicator made adverse findings regarding the lawyer's credibility and concluded that the letter was not delivered to the Law Society as claimed.

The adjudicator further concluded that even if his conclusion on that issue was incorrect, the lawyer's response letter did not reply completely to all of the requests made by the Law Society in its original communications, and did not include various file documents that the Law Society had requested.

The Hearing Division therefore concluded that the lawyer had committed professional misconduct as alleged. The lawyer's licence was suspended for one month, followed by an indefinite suspension until she provided a complete response to the specific Law Society requests for information relating to the complaints at issue: *Law Society of Ontario v. Deokaran*, 2018 ONLSTH 132.

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On 22 January 2020, the Appeal Division of the Law Society Tribunal affirmed the Hearing Division's decision: *Law Society of Ontario v. Deokaran*, 2020 ONLSTA 2. A total of \$36,000 in costs was awarded to the Law Society for the proceedings.

The lawyer then appealed to the Divisional Court. As one of the grounds of appeal before the Appeal Division and the Divisional Court, the lawyer argued that the conduct of duty counsel amounted to ineffective assistance of counsel which resulted in a miscarriage of justice.

Specifically, the lawyer claimed that duty counsel failed to review the Law Society's disclosure with her, failed to advise her of its implications, and failed to advise her to seek an adjournment in order to provide a full answer and defence to the new material. In support of her appeal, the lawyer filed a fresh affidavit in which she claimed that duty counsel failed, among other things, to carefully review and advise on the implications of the new disclosure with her, and advise what type of evidence would be best to adduce to challenge the new disclosure.

The Divisional Court referred to the well-established test for a successful appeal on the basis of ineffective assistance of counsel as articulated in, for example, *R. v. G.D.B.*, 2000 SCC 22, at para. 26 and *Gligorevic v. McMaster*, 2012 ONCA 115, at para. 66, which requires an appellant to establish the following three components:

1. The underlying facts on which the claim of incompetence is based must be established on a balance of probabilities (the "factual component").
2. Incompetent representation must be established (the "performance component").
3. The incompetent representation caused a miscarriage of justice (the "prejudice component").

The Divisional Court noted that the Law Society Appeal Division panel had held that the allegation of ineffective assistance of counsel failed to meet the first component of the test and that the evidence of the lawyer at the appeal hearing was "false and misleading," containing bald and unsubstantiated assertions about her interactions with duty counsel that were neither supported by the record nor corroborated by any objectively credible documents.

Conversely, the evidence of the duty counsel was consistent with his emails to the lawyer and consistent with his remarks on the record at the start of the hearing. In that regard, evidence filed for the ineffective assistance of counsel appeal included affidavit evidence and cross-examination from the duty counsel and his junior who acted for the lawyer at the first hearing, responding to each of the lawyer's allegations.

In the Appeal Division's view, accepted by the Divisional Court, duty counsel had no reason to proceed with the hearing contrary to the instructions or wishes of the lawyer. Rather, it would have been simple and straightforward to request an adjournment at that time. Accordingly, duty counsel's conduct in proceeding with the hearing and in dealing with the additional disclosure was reasonable and competent, and in accordance with his instructions from the lawyer.

The lawyer further argued that duty counsel should have helped and advised her to "mobilize" evidence to challenge the new disclosure. However, it was clear from the facts that this would have been a fruitless endeavour. Even with an adjournment, the lawyer could not have changed or improved her evidence or invented proofs of service to address the new disclosure.

Accordingly, the Divisional Court found no basis to interfere with the factual findings of the Appeal Division and dismissed this ground of appeal. In the Divisional Court's view, the decision to proceed on 24 August 2018, was a strategic decision on the lawyer's part. There was no suggestion that the lawyer had further or better evidence to support her claim that she personally delivered the documents to the Law Society mail room on 11 June 2018.

The lawyer raised several other grounds of appeal, all of which were [rejected](#) by the Divisional Court.

The decision shows that for an ineffective assistance of counsel appeal to have any chance of success, the appellant must have evidence to show how the result would have been different had the allegedly ineffective conduct not occurred. In this case, it was insufficient to argue that an adjournment ought to have been obtained without also demonstrating what evidence would have been obtained and proffered to change the result. A PDF version is available to download [here](#).

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