**2021**

# NOVA SCOTIA BARRISTERS' SOCIETY

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| **IN THE MATTER OF:** | The ***Legal Profession Act***, S.N.S. 2004, c. 28 and the Regulations of the Nova Scotia Barristers' Society, as amended |
| **BETWEEN:** | **The Nova Scotia Barristers' Society**<br>- and -<br>**Christopher Ian Robinson** of Halifax, Nova Scotia |

## DECISION

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| **Restrictions on Publication:** | By Order dated November 15, 2021, under section 44(3) of the *Legal Profession Act*, no person shall publish, broadcast, or otherwise disclose any information that identifies or may tend to identify clients, complainants, and independent third-party witnesses |
| Heard before: | Harvey Morrison, K.C. Panel Chair<br>Sarah Kirby, Panel Member<br>Dr. Ian Reid, Public Representative, Panel Member |
| Dates of Hearing: | October 31; November 1, 7, and 8, 2022; last written submission received December 20, 2022 |
| Date of Decision: | February 2023 |
| Legal Counsel | Justin Robichaud, K.C. and Virginia Gillmore for the Nova Scotia Barristers' Society<br>Christopher Ian Robinson on his own behalf |

**The Complaint**

1. In its complaint dated June 8, 2021 the Nova Scotia Barristers' society (The "Society") charged Christopher Ian Robinson ("the Member") with five counts of professional misconduct. Count 1 alleged that the Member:

1) failed to discharge with integrity the duties and responsibilities owed to clients, the Court, the public and other members of the profession contrary to Rule 2.1-1 of the Code of Professional Conduct (the "Code");

2) conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice contrary to Rule 2.1-1 of the Code;

3) failed to treat the Court with candour, fairness, courtesy and respect contrary to Rule 5. 1-1 of the Code;

4) failed to be courteous and act in good faith to the tribunal and all persons with whom he had dealings contrary to Rule 5.1-5 of the Code;

5) failed to encourage public respect for the administration of justice in the manner he conducted himself in the matter of *Gallagher Holdings Limited v. Unison Resources Incorporated* ("*Gallagher Holdings*") contrary to Rule 5.6-1 of the Code.

2. It is clear from the particulars provided with respect to Count 1 that unspecified violations of the Code all relate to the Member's behaviour during the *Gallagher Holdings* matter.

3. Count 2 alleged that the Member:

1) failed to discharge with integrity the duties and responsibilities he owed clients, the Court, the public and other members of the profession contrary to Rule 2. 1-1 of the Code;

2) conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice contrary to Rule 2.1-2 of the Code; and

3) failed to be courteous and civil and act in good faith with opposing counsel by engaging in aggressive and/or disrespectful behaviour contrary to Rule 7.2-1 of the Code.

4. The particulars set out in the complaint demonstrate that this Count relates to the Member's behaviour in two matters, namely the *Gallagher Holdings* matter and the events described in the complaints related to AB.

5. The third count relates to the conduct of the Member that was described in the complaints involving AB. Count 3 alleges that the Member:

1) failed to discharge with integrity the duties and responsibilities he owed to clients, the Court, the public and other members of the profession contrary to Rules 2.1-1 and 2.1-2 of the Code;

2) conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice contrary to Rule 2.1-1 of the Code;

3) engaged in a form of personal and/or gender harassment contrary to Rule 6.3-4 of the Code; and

4) failed to be courteous and civil and act in good faith with opposing counsel contrary to Rule 7.2-1 of the Code.

6. The particulars provided with respect to this Count relate to the Member's conduct following a settlement conference at the Devonshire Court House on February 5, 2019 which was described in the complaint of AB.

7. Count 4 relates to a single incident that occurred during the *Gallagher Holdings* matter. It alleges that the Member:

1) failed to discharge with integrity the duties and responsibilities he owed to clients, the court, the public, and other members of the profession contrary to Rule 2.1-1 of the Code;

2) failed to be courteous and act in good faith to the tribunal and all persons with whom he had dealings contrary to Rule 5.1-5 of the Code; and

3) failed to encourage public respect for the administration of justice during the cross-examination of a witness identified as WB during the trial of the *Gallagher Holdings* matter contrary to Rule 5. 6-1 of the Code.

8. The Member is alleged to have violated all these Rules in one incident namely staring at a witness "while at the same time swearing under his breath".

9. Count 5 alleges that the Member contravened Rule 3.2-2 of the Code by failing to be honest and candid with his client in the *Gallagher Holdings* matter and failed to inform his client of all the information known to the Member that may affect the interests of his client. The count also alleges that the Member sent a text message to his client in the *Gallagher Holdings* matter that was abusive, offensive, or otherwise inconsistent with the proper tone of professional communication from a lawyer contrary to Rule 7.2-4 of the Code.

10. As the counts allege professional misconduct in relation to two discrete matters, namely the *Gallagher Holdings* matter and the AB complaint, this decision will address each matter separately. Before proceeding further, reference should be made to the preliminary motions made to the Panel before the hearing.

**Preliminary Motions**

11. Well in advance of the hearing, the parties made the following motions for preliminary rulings by the Panel:

1) The Society made a motion that the Panel should consider that the findings of Moir, J. on March 27, 2019 decision in the

*Gallagher Holdings* matter, 2019 NSSC 104, (the "Costs Decision") were final and binding on the Parties and the Panel.

2) The Member made two motions. The first was that there should be separate hearings by separate panels in relation to the *Gallagher Holdings* and the AB complaints. The second was that the hearing on that motion should be held *in camera* due to the Member's need to refer to solicitor – client privileged matter.

12. The motions were heard by the Panel on November 9, 2021 and the Panel issued its decision on November 23, 2021.

13. The Member's motions for an *in camera* hearing and for severance of the hearing were denied. The Panel considered that with respect to the motion for an *in camera* hearing that it was not necessary to exclude the public from the hearing. If the Member deemed it necessary to refer to specific information protected by solicitor-client privilege, he could advise the Panel and the Panel would hear evidence with respect to that particular information *in camera*. With respect to the Member's severance motion, the Panel held that as the two matters on which the complaint is based are distinct it would not be difficult to keep them separate. As stated in the decision "each charge will be evaluated on evidence relating to that charge and no other". The Panel in its consideration of the merits of the Complaint has done so.

14. The Society's motion that the findings of fact of Moir, J. in the Costs Decision should be considered final and binding was granted. In its decision of November 23, 2021, the Panel stated:

> The Member's submission focused on the assertion that Moir, J. looked at the Member's conduct through a "costs lens", the findings should not be binding on the Panel which must look at his conduct through the "professional misconduct or professional responsibility lens." During his submission the Member said that all he wanted was an opportunity to advance "fulsome evidence" that what Moir, J. found did not constitute professional misconduct. One of the Panel members, Dr. Reid, noted that given the Society accepted that the Member could argue that the conduct, which was the subject of Moir, J.'s findings did not constitute professional misconduct, there seemed to be a consensus between Society's counsel with the Member. Whether that consensus actually existed was discussed in

> detail with the Member. In the end, the Member accepted that he did not argue with Moir, J.'s findings or characterization of his conduct. He did not accept that Moir, J.'s findings automatically and necessarily would lead to a finding by a Hearing Panel that he was guilty of professional misconduct.
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> The Hearing Panel considers that a consensus was reached and it was a consensus justified by the principles of the law of abuse of process and that it is, therefore, unnecessary to embark on a lengthy discussion of those principles. At the merits hearing, the Member will not be permitted to lead evidence or make argument that the specific findings of Moir, J. were wrong or should not have been made. The Member shall be entitled to lead evidence and make submissions that in the particular circumstances that the conduct which is the subject of these findings does not constitute professional misconduct. Accordingly, the Panel unanimously concludes that the motion of the Society should be granted: the findings of the fact made by Moir, J. set out above are to be considered final and shall not be challenged by the Member.

15. As the incidents of alleged professional misconduct relevant to the *Gallagher Holdings* matter occurred first in point of time, the Panel will deal with them first. After setting out the evidence of those incidents and the Panel's conclusions with respect to them, the decision will deal with the counts pertaining to the complaints related to AB.

16. One further matter should be addressed before addressing the merits of the complaint. Before the hearing concluded on November 8th, 2022, the Panel asked for submissions on the question whether in order to determine whether the Member was guilty of professional misconduct, it could take into consideration conduct (referred to in the Complaint) that in and of itself did not amount to professional misconduct but cumulatively would amount to professional misconduct. Both the Society and the Member submitted briefs on this point. The Society's brief was submitted on December 9, 2022; the Member's on December 20, 2022.

17. The Society's position was that while certain individual incidents may not warrant sanction, "as a whole they show a pattern of behaviour which can be held to be professional misconduct" (at para. 3). In the Society's view the particulars set out in respect of a count in the Complaint must be considered as a "constellation of acts that, together, constitute professional misconduct" (at para. 3).

18. The Member forcefully disagreed with that submission. He argued that if individual incidents "each of which on their own would not constitute professional misconduct" they cannot be combined or "stacked" to "show a pattern of behaviour that could be held to be professional misconduct" (at paras. 1 and 2).

19. It is clear that the Society need not prove all of the particular incidents alleged in a complaint. *Regular* v. *Law Society of Newfoundland and Labrador,* 2005 NCLA 71, at paras 24-25. Proof of a single particular, among the many set out in a complaint, may be sufficient to justify a finding of professional misconduct. See *Law Society of Alberta* v. *Heming*, 2020 ABLS 15.

20. The Member argues that each of the incidents set out as particulars of Count 1 are distinct and must therefore be considered independently. In the Panel's view the particular incidents are not distinct because they occurred in the same case. They can, if established, be considered to demonstrate a pervasive lack of respect for the process as alleged in particular (g) of Count 1.

21. The Panel does not consider it necessary to reach a concluded view on this issue. In light of the Panel's conclusions which are set out in detail below, the particular incidents which it finds to be proved are more than sufficient justification for the conclusion that the Member has committed professional misconduct. It is simply not necessary for the Panel to take into account those particular incidents which the Panel has found to have not been established to its satisfaction in order to make a finding of professional misconduct and the Panel has not done so.

***Gallagher Holdings***

22. The specific findings of Moir, J. that the Panel has found to be final and not subject to challenge were that the Member:

a) obstructed the discovery process on several occasions as described in the Costs Decision.

b) evaded disclosure relating to the telephone records, withheld an e-mail until after a witness testified, refused to set new deadlines after initially not making the first deadline, agreed to a

deadline only after the applicants prepared a motion, and made excuses for his client's failure to provide financial records.

c) disobeyed a Court order that he personally review telephone records and provide relevant records to the Plaintiff's counsel.

d) Filed two pretended affidavits with the Court.

e) Knowingly filed and used an incomplete affidavit of a critical witness, IJ.

f) Encouraged waste by coming up with a far-fetched interpretation of a settlement agreement and making up stories to explain the delay in payment under a settlement agreement and caused costs associated with the Plaintiff's having to prove it was a settlement agreement, and;

g) Demonstrated a pervasive disrespect for counsel opposite, the Court and ultimately the process.

23. The Society called no evidence with respect to these matters. It was content to rest its case on the facts found by Moir, J. It should be noted that the Society did call evidence with respect to one very specific incident in the *Gallagher Holdings* matter. That evidence related to the alleged professional misconduct of the Member during the cross-examination of a particular witness. That evidence will be dealt with when the Panel addresses Count 4.

24. Although the Member accepted and the Panel found that he could not assert that Moir, J.'s findings were wrong or should not have been made, the Member's evidence and submissions were often couched in terms that were meant to suggest that the factual conclusions of Moir, J. were not justified on the facts.

**The Specific Findings of Moir, J.**

(a) Obstructing the discovery process

25. Moir, J. found that the Member obstructed the discovery process on five occasions described in detail at paragraphs 54 to 63 of the Costs Decision, namely that

(i) The Member stopped the Applicants' counsel from questioning the Respondent's experts about the details of his engagement.

(ii) The Member instructed the Respondent's expert not to respond to the questions relating to his communication with the Respondent KL on the grounds of relevance.

(iii) The Member prevented the Respondent's expert from answering questions whether his application of accounting standards would have been affected had he known that the financial report he prepared was required for the purposes of litigation.

(iv) The Member prevented a witness from answering questions put to her regarding compensation she received from one of the Respondents.

(v) The Member "torpedoed" the questioning of a witness in relation to his involvement in raising funds for the Respondent Unison Resources Incorporated.

26. The Member in his evidence, tried to shift the attention from his conduct to that of the Applicants' counsel. He said he objected to the way Mr. Keith conducted the discovery. He perceived it as "Rambo litigation". When Mr. Keith stated that he would go to court to get an order that his questions be answered, the Member testified that he did not know why Mr. Keith wanted to go to court. He added that a motion to the court to compel answers was the way the process works. This echoed that Member's argument to Moir, J. "Counsel for a party objects to a question and, if both counsel could not resolve the issue, they go to court (Costs Decision, para. 62).

27. Moir, J. rejected this argument in blunt terms stating at para 63 of the Costs Decision:

> Emphatically, Mr. Robinson's approach is not how discovery is to be conducted in this province. Inventing far-fetched objections undermines his client's obligations to make disclosure and wastes time. Efforts at preparation are wasted. The expense of extracting answers by the court intervention in incurred, unless the questioning party gives up and goes to trial knowing full disclosure has not been made.

28. When the Member appealed Moir, J.'s Costs Decision to the Court of Appeal, Scanlan, J.A., who delivered the judgment of the Court dismissing the appeal said that he agreed with Moir, J.'s assessment of Mr. Robinson's approach to discovery: *Robinson* v. *Gallagher Holdings Limited,* 2019 NSCA 97, at para. 45 (the "Appeal Decision").

29. The Panel agrees with and adopts the comments of both Moir, J. and Scanlan, J.A. Objecting to questions on grounds that are far-fetched, and which, moreover, are obviously relevant in the expectation that his opponent would be forced to go to court to get an order requiring that they be answered is not how discovery examinations should be conducted in Nova Scotia. But does the Member's conduct in this regard constitute professional misconduct?

30. To answer this question, it is necessary to consider the content of the Rules that the Society alleges the Member has violated. The first Rule that the Member is alleged to have contravened is Rule 2.1-1. That Rule is the first substantive Rule set out in the Code and is perhaps the Code's foundational rule. It states:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of that profession honourably and with integrity.

31. "Much has been written on the importance of integrity as the foundation of the profession": *Law Society of Alberta* v. *Ingimundson*, 2014 ABLS 52, at para 34. There are, however, surprisingly "few authorities that deal extensively with the meaning of the word integrity": *Law Society of Manitoba* v. *Sullivan*, 2018 MBLS 9, at para 28. Indeed, integrity has been described as a "more nebulous concept than honesty. Hence it is less easy to define…": *Wingate* v. *Solicitors Regulation Authority*, [2018] EWCA Civ 366, at para. 96. Courts and tribunals have accepted that it is not possible to formulate an all-purpose comprehensive definition of the term. They have not,

however, succumbed to the counsel of despair often associated with the comment of Potter Stewart, J. of the United States Supreme Court in his concurring judgement in *Jacobellis* v. *Ohio,* 378 U.S. 184 when, after admitting that he could not define "hard-core pornography", he said "But I know it when I see it" (at p.197). See also *Wingate* v. *Solicitors Regulation Authority,* [2018] EWCA Civ 366, at para. 98.

32. As Rupert Jackson, L.J. stated in *Wingate* v. *Solicitors Regulation Authority*, [2018] EWCA Civ 366, the "broad contours of what integrity means, at least in the context of professional conduct, are now becoming clearer" (at para 99). Among the contours that have become clear is the principle that integrity is a broader concept than honesty: *Wingate* v. *Solicitors Regulation Authority*, [2018] EWCA Civ 366, at para. 95.

33. In the *Law Society of Ontario* v. *Goodman*, 2020 ONLSTH 101, the Panel observed that integrity "includes honesty and fair dealing but is more than that" (at para. 25). As the panel of the *Law Society of Alberta* v. *Ingimundson*, 2014 ABLS 52, integrity "is not just the absence of deceitful conduct" (at para 48). See also *Law Society of Manitoba* v. *Currie*, 2022 MBLS 5 at para 23. Dishonesty and want of integrity are separate and distinct concepts: *Williams* v. *Solicitors Regulation Authority*, [2017] EWHC 1478, at para 54 and 130. See also *Wingate* v. *Solicitors Regulation Authority*, [2018] EWCA Civ 366, at para 95.

34. There is a want of integrity "when objectively judged, a solicitor fails to meet the high professional standards to be expected of a solicitor. It does require the objective element of conscious wrongdoing": *Williams* v. *Solicitors Regulation Authority*, [2017] EWHC 1478 (Admin), at para 54. In his concurring judgement in *Williams*, Leveson, P. stated at para 130:

> I ought to make it clear that, in the absence of compelling justification, I would reject Mostyn, J.'s description of the concept of want of integrity as second-degree dishonesty. Honesty, i.e. a lack of dishonesty, is a base standard which society requires everyone to meet. Professional standards, however, rightly impose on those who aspire to them a higher obligation to demonstrate integrity in all of their work. There is a real difference between them.
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> (emphasis added)

35. In *Wingate* v. *Solicitors Regulation Authority,* [2018] EWCA Civ 366, Rupert Jackson L.J. stated at paras 97, 100-101:

> In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members… The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards….
>
> Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations of a barrister making submission to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.
>
> The duty to act with integrity applies not only to what professional persons say, but also what they do.

36. In *Law Society of Manitoba* v. *Sullivan,* 2018 MBLS 9, the Panel stated at para. 28:

> One definition of integrity is "soundness of moral principle and character… it is synonymous with probity, honesty, and uprightness. The best and simplest definition we have been able to find is "Having integrity means doing the right thing in a reliable way. It's a personality trait we admire, since it means a person has a moral compass that doesn't waver."
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> (internal citations omitted)

37. Moir, J. regarded the questions to which the Member objected and instructed the witness not to answer were obviously relevant and held that the Member invented "far-fetched" objections". Moir, J. held that the conduct of the Member amounted to obstructing the discovery process. That conduct was not a single incident, but it constituted conduct that prevented the discovery examination in question from being conducted "effectively and expeditiously" to use the language of the Commentary to Rule 7.1-2. This is not a case where counsel reasonably disagree about the relevance of a question or the validity of a question. Such disagreement and objections cannot be described as "far-fetched". Conduct that involves far-fetched objections to obviously relevant questions cannot be regarded as reasonable and is properly considered to violate

the Code. It was conduct that also did not meet the objective of the Civil Procedures Rules for a just, speedy and inexpensive determination of the *Gallagher Holdings* proceeding. The far-fetched objections were, moreover, frivolous and vexatious objections and were an example of conduct concluded to "merely delay or harass" the Applicants in the *Gallagher Holdings* matter.

38. This pattern of conduct demonstrates that the Member failed to act with integrity when he obstructed the discovery process in the manner described by Moir, J. in the Costs Decision. The making of repeated far-fetched objections to obviously relevant questions so as to constitute obstruction of the discovery process is conduct that does not meet the high standards to be expected for a member of the Society.

39. The Commentary to Rule 2.1-1 states:

> [1] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> [2] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice
>
> (emphasis added)

40. Obstructing discovery examinations with the attendant increased expense to the litigants as well the inevitable increase in friction between counsel for the parties cannot inspire the respect and trust of clients and perhaps more importantly of the community. Such conduct would suggest to the community that the lawyer has chosen to harass and obstruct the other side for no legitimate purpose.

41. Intentionally obstructive conduct is necessarily questionable conduct that cannot help but reflect adversely on the integrity of the profession and the administration of justice. It also follows that the obstructive conduct represented a failure to encourage public respect for the administration of justice.

42. The repeated employment of far-fetched objections to obviously relevant questions showed a distinct lack of civility and courtesy to the Applicants' counsel. Courtesy must surely include the duty of counsel to allow opposing counsel to reasonably represent his own clients' interests and to not improperly impede that representation. The Member's obstructive tactics that had no purpose but to delay or harass the other side must be regarded as failures to treat opposing counsel with courtesy.

43. In the Panel's view the Member's conduct in obstructing the discovery process in the five instances set out above does constitute professional misconduct. It demonstrates a lack of integrity in the discharge of the duties and responsibilities the Member owed to other members of the profession as required by Rule 2.1-2 of the Code. In obstructing the discovery process the Member also failed to be courteous and act in good faith to another member of the profession, i.e. the Applicants' counsel.

44. The Member argues that because he honestly believes that his objections were bona fide he cannot be guilty of professional misconduct. He relies on *Groia* v. *Law Society of Upper Canada*, 2018 SCC 27 for the proposition that a "lawyer's honestly held but mistaken belief as regards to the law and the rules of procedure, does not amount to professional misconduct": Member's submissions dated October 25, 2022, at para 81.

45. The *Groia* case is the leading Canadian case on whether the lack of civility can constitute professional misconduct. In that case the Law Society of Ontario brought disciplinary proceedings against Mr. Groia alleging professional misconduct based on his uncivil behaviour during a trial. During the trial, Mr. Groia made repeated allegations of professional impropriety against opposing counsel, the prosecutors representing the Ontario Securities Commission. In proceeding before tribunals of the Law Society, Mr. Groia was found guilty of professional misconduct. This finding was upheld by the Divisional Court and the Court of Appeal for Ontario. On appeal by Mr. Groia, the Supreme Court of Canada held that although the Appeal Panel's general approach to the issue of civility was sound, the actual decision that Mr. Groia was guilty of professional misconduct was unreasonable (at para 122). Moldover, J. who delivered the judgment of the majority of the Court stated that there was only one "reasonable outcome in this matter: a finding that Mr. Groia did not engage in professional misconduct <u>on account of civility</u>" (at para. 125, emphasis added).

46. The imputations of misconduct against the prosecutors were grounded in the dispute over the disclosure and use and admissibility of documents. As Moldaver, J. observed "much of the disagreement stemmed from Mr. Groia's honest but mistaken understanding of the law of evidence and the role of the prosecutor". Mr. Groia's position on the "admissibility of documents was founded on two legal errors" (at para 21).

47. The Supreme Court recognized the importance of maintaining civility in the practice of law. Moldaver, J. set out four ways incivility could damage trial fairness and the administration of justice:

a) Incivility can "prejudice the client's cause". Moldaver, J. stated at para. 64:

> Uncivil communications with opposing counsel can cause a breakdown in the relationship, eliminating any prospect of settlement and increasing the client's legal costs by forcing unnecessary court proceedings to adjudicate disputes that could have been resolved with a simple phone call. As one American commentator aptly wrote:
>
> Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice… This mindset eliminates peaceable dealings and often forces dilatory, inconsiderate tactics that detract from just resolution.

b) Incivility is "distracting". It diverts lawyers and the courts from giving proper attention to the substantive merits of the case (at para. 65);

c) Incivility can cause adverse impacts on other participants in the justice system (at para. 66), and;

d) "[I]ncivility can erode public confidence of justice" by diminishing the public perception of the justice system as a fair dispute-resolution and truth-seeking mechanisms (at para. 67).

48. The Court also recognized that "standards of civility cannot compromise the lawyer's duty of resolute advocacy" (at para. 71) which is a "vital ingredient in our adversarial justice system – a system promised on the ideal that forceful partisan advocacy facilitates truth-seeking" (at para. 72). Civility "and resolute advocacy are not incompatible". It is necessary, however, that when

defining uncivility and assessing "whether a lawyer's behaviour crosses the line" to take care that a "sufficiently high threshold" is set in order to not chill fearless advocacy" (at para. 76).

49. Moldaver, J. on behalf of the Supreme Court accepted that the approach of the Appeal it was sufficiently precise to give a workable guide against which lawyers could measure their behaviour and for law society disciplinary panels in their task of determining whether a lawyer's behaviour amounts to professional misconduct.

50. The Panel will not address in detail all the factors identified by the Appeal Panel and approved by the Supreme Court that ought to be considered by a disciplinary panel when evaluating a lawyer's conduct. Instead, we will focus on what Moldaver, J. said in relation to the salience of legal error to potential findings of incivility.

51. Moldaver, J. stated that he shared the concerns of the interveners that "law societies should not sanction lawyers for sincerely held but mistaken legal positions or questionable litigation strategies" (at para. 85). This statement was made in connection with his discussion of what the lawyer said which was one of the factors that was part of the evaluation of the lawyer's conduct. What Mr. Groia said were allegations of prosecutorial misconduct throughout the lengthy first phase of the trial. The Appeal Panel and ultimately the Supreme Court held such allegations on "other challenges to the integrity cross the line into professional misconduct unless they are made in good faith and have a reasonable basis" (at para.81). Moldaver, J. considered that "it was open to the Appeal Panel to conclude that allegations of prosecutorial misconduct or other challenges to opposing counsel's integrity must be made in good faith and have a reasonable basis" (at para. 84).

52. The reasonable basis requirement was not, in Moldaver, J.'s view, "an exacting standard":

> I understand the Appeal Panel to have meant that allegations made without a reasonable basis are those that are speculative or entirely lacking a factual foundation. Crucially, as the Appeal Panel noted, allegations do not lack a reasonable basis simply because they are based on legal error: at para. 280. In other words, it is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.

(emphasis added)

53. Legal error on the other hand, may be resorted to when the lawyer's good faith is evaluated. Moldaver, J. stated at para 93:

> When a lawyer alleges prosecutorial misconduct based on the legal mistake, law societies are perfectly entitled to look to the reasonableness of the mistake when assessing whether it is sincerely held, and hence, whether the allegations were made in good faith. Looking to the reasonableness of a mistake is a well-established tool to help assess its sincerity… The more egregious the legal mistake, the less likely it will have been sincerely held, making it less likely the allegation will have been made in good faith. And if the law society concludes that the allegation was not made in good faith, the second question – whether there was a reasonable basis for the allegation – falls away.

54. The Member treats that analysis of the Supreme Court in *Groia* as if it provides a shield against a finding of professional misconduct no matter what aspects of the Code form the basis of the complaint. In his submission, as long as the conduct is based on an honestly held legal error or mistake, he cannot be found guilty of professional conduct.

55. In the Panel's view, *Groia* does not go that far. The Supreme Court was clear that it was considering whether Mr. Groia's allegedly uncivil behaviour "crossed the line" into professional misconduct. Moldaver, J. repeatedly stated the question being considered was whether the conduct amounted to professional misconduct <u>by reasons of incivility</u>. For example, Moldaver, J. noted that the "reasonable basis" inquiry requires a law society to "examine the [factual] foundation underpinning the allegations":

> Looking at the reasonableness of a lawyer's legal position at this stage would, in effect, impose a mandatory minimum standard of legal competence in the incivility context. In other words, it would allow a law society to find a lawyer guilty of professional misconduct on the basis of incivility for something the lawyer, in the law society's opinion, ought to have known or ought to have done. And, as I have already explained, this would risk unjustifiably tarnishing a lawyer's reputation and chilling resolute advocacy.
>
> That, however, does not end the matter. As my colleagues observe, "the Law Society rules govern civility and competence":… A lawyer who bases allegations on "outrageous" or "egregious" legal

> errors may be incompetent. My point is simply that he or she should not be punished for *incivility* on that basis alone.
>
> (emphasis added)

56. If conduct was immunized from a finding of professional misconduct by reason only of the lawyer's good faith or honestly held belief, much of the Code would become otiose. Many of the Rules would become unenforceable.

57. The Panel therefore rejects the Member's assertion that *Groia* provides a defence to the charge that by obstructing the discovery process, the Member failed to act with integrity. Moir, J. found that the Member, by his conduct, obstructed the discovery process. The Member made no legal mistake. The Civil Procedure Rules do indeed provide a mechanism for the resolution of disputes with respect to objection at discovery examinations. The Rules are premised on there being a genuine or reasonable dispute as to the validity of an objection. The Member adopted far-fetched objections to questions of obvious relevance with the intent to obstruct the discovery examinations of witnesses put forward on behalf of his clients, the Respondents. The Panel finds that the Member failed to act with integrity contrary to Rule 2.1-1. The Panel shares the view of the Member's conduct expressed by Scanlan, J.A. in the Appeal Decision at para. 46:

> "This is more than a lawyer being entitled to make a mistake in the law. A review of the record confirms that Mr. Robinson used the process as vehicle to frustrate disclosure instead of it being a vehicle intended to facilitate disclosure. On this appeal Mr. Robinson blamed the partial disclosures and non-disclosures of documents, including time disclosure of emails and other records, on anybody but himself. Mr. Robinson has to share much of the blame for how the litigation process failed his clients, the respondents, and the administration of justice.
>
> (emphasis added)

**Evasion of Disclosure**

58. Moir, J. described how the Member evaded the disclosure of telephone records in the Costs decision at paragraphs 64-70. It must be borne in mind that the Panel has held in its decision on the preliminary motions that this finding is final and binding. The Member cannot assert that it was wrong or should not have been made. He is only permitted to argue that his conduct as Described by Moir, J. did not constitute professional misconduct.

59. In summary Moir, J. held that:

a) Wood, J. (as he was) in an interlocutory motion ordered the Member's client KL to provide all records associated with his telephone accounts to the Member so that he could review them for relevance. The member was personally ordered to deliver relevant records to the Applicants;

b) The Member reviewed the telephone records and would have been aware that they contained records of telephone communications with many relevant people. The Member failed to disclose those records to the Applicants;

c) The Member used one of the previously undisclosed records to cross-examine one of the Applicants;

d) The Member withheld an e-mail until after a witness testified;

e) The Member refused to set a new mutually agreeable deadline after the Respondents failed to make disclosure until the Applicants prepared a motion to compel production;

f) The Member made far-fetched excuses for the Respondent Unison's failure to provide financial records.

60. Moir, J. observed in this connection that the Member obstructed fairness by making "far-fetched arguments about what Justice Wood meant to order and what relevancy means" (at para. 68). Moir, J. also considered that the Member made "far-fetched excuses" for the Respondent Unison's failure to provide financial records. This was said to be a further example of the Member's "encouraging" non-disclosure: Costs Decision, at para 70.

61. In his submission the Member provided a lengthy description of how he handled the disclosure of the telephone records. In essence, he sought to demonstrate that Moir, J. was wrong to find that he evaded disclosure. As the Panel held in its earlier decision, that is something that the Member was not permitted to do. The findings of Moir, J. were final and binding. The Member cannot seek to show that they were wrong or should not have been made.

62. Nevertheless, in a telling comment, the Member in his submission (at para. 19) stated that:

> I never turned my mind to any calls in the records between [KL] and Mr. Keith's clients, or between [KL] and [MN]… it never occurred to me that those call records should be disclosed – if Mr. Keith has asked for them they would have been produced, but he never asked, and I never thought they needed to be provided. The entire issue regarding phone call disclosure arose as the result of an undertaking request (which was taken under advisement) that flowed from the discovery of [KL], and in Mr. Keith's motion brief filed with Justice Gabriel- Mr. Keith speaks directly to what phone records he wanted and why.

63. It is simply incredible that a Nova Scotia lawyer who portrays himself as a litigator of some experience would say that he never turned his mind to whether telephone records between the interested parties should be disclosed. The obligation of disclosure that is imposed on every litigant is to disclose and provide relevant documents not just the documents for which an opposing party may ask. Such an approach would undermine the fundamental principle that has governed the discovery of documents in Nova Scotia for the past 50 years.

64. This is not a case of a lawyer making a mistake of law or a single error of judgment. When looked at in light of the other conduct displayed by the Member in the *Gallagher Holdings* matter shows that this was a calculated effort to obstruct the progress of the case and to thereby gain some unjustified advantage for the Member's clients.

**Pretended Affidavits**

65. The pretended affidavits were those of OP and MN which were filed on behalf of the Respondents by the Member in December 2016. The affidavits were held to be "pretended" by Moir, J. because the Member falsely signed the jurat indicating that it was sworn before the Member at Halifax on December 16, 2016. The Member admitted at the hearing that the affidavits were not sworn before him, and they were not sworn at Halifax.

66. The pretended affidavits were filed by the Member without advising the Respondents' counsel that they were anything but proper affidavits. The Member could have attempted to correct his mistake at any time after filing. It was only during the discovery examination of MN that it was revealed that the affidavits were not signed in front of the Member.

67. The Respondents made a motion to have them struck. Gabriel, J., who heard the motion, adopted that "most benign interpretation" in the circumstances that he could and allowed them to be withdrawn. In Moir, J.'s view, such a benign interpretation was not possible. He found in his decision on the merits (2018 NSSC 251, the "Merits Decision") that "the documents were not affidavits at all" but on the contrary "a document was made to look like it got sworn, like it provided evidence, like it was subject to the laws of perjury": Costs Decision, para 76 citing para. 363 of the Merits Decision. Significantly, Moir, J. commented in the Merits Decision that "Courts and other must be protected from acting on what appears to be sworn evidence, but which is not. That is why pretended affidavits are illegal. See Criminal Code, s. 138" (at para 364).

68. The comments of Scanlan, J.A. in the Appeal Decision are apposite:

> Mr. Robison submitted to the court, as evidence, affidavits of witnesses which he knew were "pretend". He knew the affidavits in question were not signed in the presence of himself. In one case he forwarded just a jurat for a client to sign, the client not even knowing what was in the affidavit. At appeal he dismissed this as being no

> big deal, not unlike a lawyer who he says has a property instrument executed at a front desk of a lawyer's office and the jurat signed later by the lawyer. To that I say, and Justice Moir communicated as well (Costs Decision, paras. 71-76; Merits Decision, para. 360); **it is a big deal.** Here witnesses were testifying, under threat of perjury, as to the veracity of their sworn affidavit, while Mr. Robinson knew full well that in some cases the witness could not have been aware of the contents of the affidavit when they signed a single page without seeing the contents of the affidavit to be filed. Mr. Robinson should now recognize the seriousness of the situation in which he placed the affiants. He was an integral part of misleading the Court as to the veracity of the file affidavits.
>
> (emphasis on the original)

69. At the hearing the Member did not offer an excuse, perhaps heeding Scanlan, J.A.'s admonishment. He testified that he should not have falsely signed the jurats of the pretended affidavits. He also testified that by doing so he acted contrary to his professional obligations. The findings of Moir, J., and the admission of wrongdoing by the Member compels the Panel to find that the Member is guilty of professional misconduct in filing the two pretended affidavits. What he did with respect to the pretended affidavits demonstrated a distinct want of integrity contrary to Rule 2.1-1 and a breach of his duty to uphold the standards and reputation of the legal profession contrary to Rule 2.1-2.

70. Rule 5.1-1 requires a lawyer when acting as an advocate to treat the tribunal with, inter alia candour and respect. By filling two pretended affidavits with false jurats, the Member acted completely contrary to his duty of candour. Moreover, to place before the Court two pretended affidavits the Member showed a distinct lack of respect to the Court and its processes.

71. Rule 5.1-2 was also breached. Rule 5.1-2 states that a lawyer when acting as an advocate must not:

> Knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts of law, presenting or relying upon a false or deceptive affidavit, supressing what ought to be disclosed or otherwise assisting in fraud, crime or illegal conduct.
>
> (emphasis added)

72. It is clear that the Member's conduct in filing the two pretended affidavits falls squarely written in the prohibitory language of Rule 5.1-2 (e).

73. The filing of the pretended affidavits also contravenes Rule 5.6-1 which provides that a lawyer "must encourage public respect for and try to improve the administration of justice. It is hard to imagine anything less likely to encourage public respect of the administration than filing falsely sworn pretended affidavits.

**Filing and Use of an Incomplete Affidavit**

74. The Member testified that he prepared a comprehensive draft affidavit and provided it to IJ. The draft affidavit contained all the information and exhibits that were part of KL's affidavit and that of MN. IJ, who had his own lawyer in his home province of Alberta, was not prepared to accept the draft affidavit composed by the Member. Instead, he provided to the Member a severely truncated affidavit that had no exhibits. The Member noted that IJ's affidavit contained 1/3 fewer paragraphs than his draft and the paragraphs of the affidavit were "extremely perfunctory".

75. As the Member had no ability to compel IJ, a non-party witness, to provide an affidavit in the form the Member would have preferred, the Panel does not consider the filing of IJ's truncated or incomplete affidavit to be professional misconduct.

76. Moir, J. criticisms, however, were directed not so much to the less than comprehensive nature of IJ's affidavit but to the fact that the Member failed to tell IJ that his calls with KL and MN had been surreptitiously recorded by MN. The Member "knew about the recordings when he filed IJ's affidavit": Costs Decision, at para 80. Moir, J. considered that the Member should have consulted IJ before filing the inadequate affidavit. Instead, he did nothing: Costs Decision, at para 81.

77. Moir, J. described the consequences of the Member's failure to file a comprehensive affidavit (at paras 82-83):

> The filing of a comprehensive affidavit would have saved much time. [IJ]'s evidence on the deterioration on Unison's finances, and the ultimate demise of Unison's proposal would have put much of [KL]'s and [MN]'s evidence under a severe light. Instead, [IJ]'s

> significant evidence only came out at the very end of the hearing, and after lengthy adjournments.
>
> Common sense tells us that failing to provide an affidavit from [IJ] that covered the truths revealed by the recordings, and the further significant truths, made the hearing, and preparations for it, far less efficient. To expose the witness to cross examination on the concealed recordings was also seriously abusive.

78. It is clear and as found by Moir, J. that the Member should have informed IJ about the recordings before filing his affidavit. It is also clear that a comprehensive affidavit would have made the hearing much more efficient. What is not clear is whether the disclosure of the fact that there were recordings of his telephone conversation with KL MN would have made IJ more willing to file a comprehensive affidavit. Is it possible that the knowledge of the recordings would not have made any difference to IJ. Consequently, the Panel does not consider that the evidence including the findings of Moir, J. warrants a finding of professional misconduct against the Member.

**Encouraged Waste**

79. Moir, J. held that by coming up with a far-fetched interpretation of a settlement agreement between the parties the Member "encouraged" waste. Moir, J. referred to "a series of stories made up to explain the delay in payment" under the settlement agreement (at para. 86). These two situations require separate considerations because the "far-fetched" interpretation of the settlement agreement occurred in court. The "made up stories" did not. They were put forward to forestall proceedings to enforce the settlement agreement.

80. The claim advanced by the Applicants in the *Gallagher Holdings* matter included a claim (albeit in the alternative) based on the settlement agreement. Moir, J. found in the Merits Decision that the e-mails exchanged between the Member and counsel for the Applicants on October 2, 2015 constituted a settlement agreement binding on the parties. In doing so Moir, J. rejected the argument advanced by the Member that the agreement was not a settlement agreement but merely a forbearance or stand still agreement: Merits Decision, at para 416. Moir, J. in his Merits Decision did not suggest that the Member's argument in this regard was "far-fetched": The closest he came occurred when, in rejecting the Respondents' argument that the agreement itself could not be

proved be of settlement privileged, he said "it would be absurd to apply settlement privilege to frustrate its very purpose, to encourage settlement agreements" (at para. 426).

81. In his Costs Decision Moir, J. was much more critical stating that the "Member came up with a far-fetched interpretation of the very term he had created" (at para 85). It is important to note that in his Merits Decision, Moir, J. was clear that the terms of what he found to be the settlement agreement were drafted by the Applicants' counsel (at para. 412).

82. Although Moir, J. regarded the argument advanced by the Member to be far-fetched, the Supreme Court of Canada in *Groia* has cautioned against being overly critical of legal arguments after the fact (see e.g. at para. 89). The Panel considers that in these circumstances where Moir, J. did not condemn the argument advanced by the Member in his Merits Decision and did not suggest that the Member did anything improper in making it, there are insufficient grounds for a finding of professional misconduct.

83. With respect to the "made up stories" to excuse non-payment under the settlement agreement, the Member testified that he did not make up anything. He was merely the conduit of information emanating from his client. This explanation was not seriously challenged by the Society. The Panel finds that the evidence of "making up stories" is not sufficient to support a finding of professional conduct in this case.

**Pervasive Disrespect**

84. In the Costs Decision Moir, J. spoke of the Member's "pervasive disrespect for counsel opposite, the court, and ultimately the process": Costs Decision Para. 94. This was an inference from the "abuses" evident from production, discovery, evading disclosure, pretended affidavits, the uninformative IJ Affidavit and the settlement agreement as well as "plenty of other evidence" (at paras. 87 and 88). The "plenty of other evidence" included the Member's less than professional response "to a reasonable request for costs" (at para. 90).

85. Moir, J. also referred to "less than professional references to counsel" After the cross-examination of IJ by Ms. Regan-Cottreau Moir, J. stated at para 93:

> Mr. Robinson's very first question started with him saying that, more times than he could count, Ms. Regan-Cottreau asked "long, rambling questions" to which [IJ] just answered "Sure". Ms. Regan-Cottreau never rambled. The witness provided important evidence that Mr. Robinson left out of the affidavit. He did not just say "Sure". It would have been unprofessional for counsel to provide his assessment to the witness, even if the assessment was correct instead of being simply insulting.
>
> (emphasis added)

86. Written confirmation of the Member's pervasive disrespect in Moir, J.'s view was found in "a statement made by the member at the beginning of the litigation, and statements that came to light in the end: (at para 94). Moir, J. stated at paras 95-97;

> The first statement came when [KL] and Unison defaulted on the settlement agreement. Mr. Robinson made this threat:
>
> > In the event that your clients [lose] their patience and file suit, please let them know that there will be no funds available to repurchase their shares- the "bell" will have been rung, and they can look forward to nothing but a protracted legal fight and substantial legal fees.
>
> Mr. Robinson helped the respondents to deliver a needlessly protracted and wastefully expensive defence. The threat makes it clear that Mr. Robinson intended the waste.
>
> After the hearing, Mr. Robinson taxed his outstanding fees and sued [KL]. Copies of some emails from Mr. Robinson to his clients were introduced at the taxation hearing.
>
> I will not repeat the vile names by which Mr. Robinson referred to Mr. Keith in the correspondence. I will not repeat the vile expressions by which Mr. Robinson denigrated judges of this court. The substance is of importance: abject disrespect for counsel opposite and the judges.

87. We have already in this decision addressed the "abuses" referred to by Moir, J. in paragraphs 87 and 88 and have found that four of the six "abuses" constitute breaches of the Code.

88. As noted above, integrity involves the adherence to the high professional standards of a member of the society. The obligation to act with integrity is reinforced by Rule 2. 1-2 which states that a "lawyer has a duty to uphold the standards and reputation of the legal profession. As the

Panel observed in *Law Society of Manitoba v. Sullivan,* 2018 MBLS 9, having integrity means doing the "right things in a reliable way".

89. Commentary [8] to Rule 5.1-1 states:

> In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

90. Rule 5.1-5 and its counterpart Rule 7.2-1 require the lawyer to be "courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings". The commentary to Rule 5.1-5 states that a "consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct". In Commentary [1], to Rule 7.2-1 states:

> [1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

91. Also of relevance is Rule 1.01 of the Civil Procedure Rules which sets out the object of the Rules: "the just speedy, and inexpensive determination of every proceeding."

92. In paragraphs 89-97, Moir, J. referred to what he regarded as "plenty of other evidence" of the Member's disrespect of the Court's process. The Panel will address in detail the "vile names" the member referred to the Applicants' counsel and the "vile expressions" by which the Member "denigrated judges of the court" in our discussion of Count 2. It is sufficient for now for the Panel to say that we agree with Moir, J. that those names and expressions with perhaps one exception, are clear instances where the Member has failed to show the kind of respect to the Court and other counsel as required by the Code.

93. Moir, J. referred to instances where the responses of the Member in the motion heard by Lynch, J. were less than professional. Unfortunately, these are the conclusions of Lynch, J. about

the Member's conduct and it is hard for the Panel, in making our determination with respect to the matters alleged in the Complaint, to evaluate properly the nature of the Member's unprofessional conduct without any evidence of what that conduct was. There are, however, the pointed comments of Moir, J. regarding the "less than professional" references to counsel opposite during the hearing (see para. 93 set out above). What was "less than professional" were the "simply insulting" comments of the Member with respect to opposing counsel's manner in cross-examining a witness.

To insult a fellow member of the bar in face of the Court is conduct that displays a want of integrity. As Commentary [2] to Rule 2. 1-1

> A lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community…

94. Insulting another member of the bar in court before the Judge and witnesses reflects most unfavourably on the legal profession and would diminish rather than inspire the confidence and trust of the clients and the community. It represents, furthermore, a failure to uphold the "standards and reputation" of the legal profession as required by Rule 2.1-2 and it is also a breach of the duty of courtesy and civility recognized in Rule 5.1-5. There can be no appeal to *Groia* in this context. The Supreme Court's decision in that case cannot protect a lawyer from a finding of professional misconduct in relation to something that was "simply insulting". There can be no reasonable basis for conduct that is "simply insulting".

95. The Member's statement made at the beginning of the litigation which Moir, J. referred to as a threat (at para 95) was an accurate prediction of the way in which the litigation unfolded. It unfolded that way because of the Member's conduct. Scanlan, J.A.'s comments in the Appeal Decision at para 49 are apt:

> How the appellant conducted himself leading up to and during the merits hearing and also in this appeal goes to the heart of the integrity of the justice system, demonstrating conduct that is beyond reasonable contemplation, even in the context of the most contentious litigation.

96. During the hearing, the Member said more than once that he was a formidable litigator. It seems to the Panel that in seeking to present himself as formidable his approach to litigation has a

performative quality: litigation as theatre. It is as if by insulting other counsel and showing disrespect to the court's process, exemplified by the abuses related above, he somehow proves to himself and his clients that he is, in fact, formidable. On the contrary, such conduct diminishes not only the legal profession and the administration of justice, but himself.

97. In the Appeal Decision, Scanlan, J.A. when referring to the "vile" descriptions of opposing counsel and even judges of the trial court said:

> The lack of awareness and concern he demonstrates respecting the import those comments may have had on the litigation and his profession is concerning.

98. The Panel agrees and is of the view that this comment applies equally to the "plenty of other evidence" described by Moir, J. in the Costs Decision and supports the Panel's conclusion that the pervasive disrespect found by Moir, J. amounts to professional misconduct on the grounds set out above.

**Count 2**

99. Count 2 covers allegations with respect to two separate and distinct circumstances. The first relates to e-mails that the Member sent to his client in the *Gallagher Holdings* matter. The second set of allegations relate to the Member's conduct at a case conference convened in a child protection matter involving his clients KB and DS.

**The *Gallagher Holdings* E-mails**

100. These emails came to light in the course of a taxation proceeding when the Member sought to have the accounts that he rendered to his client KL taxed. Those proceedings culminated in a hearing before an adjudicator of the Small Claims Court of Nova Scotia. At that hearing, KL introduced copies of a number of e-mails sent by the Member to KL. In his submission dated October 25, 2022, the Member described the e-mails he sent as follows:

> In the emails at issue, I referred to opposing counsel as "idiot-boy" and "asshole". I also referred to judges of the Supreme Court as "pansies" and I wondered if the Justice who was set to hear a production motion filed the complainants "had any balls".

101. The Member's submission went on to state (at para. 63):

> I can't recall who of the two of us coined the phrase "idiot-boy", it may have been me, I don't remember; the word "asshole" was a pretty common descriptor.

102. The submission also relates that the Member and the Applicants' counsel had a "palpable dislike for one another". Reference was made to the Member finding the Applicants' counsel to be "aggressive and abrasive". As the case proceeded, the Member said that he became "familiar with Mr. Keith's aggressive tactics and approach" and "came to share [KL]'s dislike". During the hearing, the Member referred to those tactics as "Rambo litigation". Notwithstanding his "palpable dislike of the Applicants' counsel, the Member said that he "respected – and quite frankly, feared – Mr. Keith as an extremely competent litigator".

103. The Member made much of the fact that KL had been a longstanding friend, and because of that, he would speak to him "in a rougher, more profane, more colloquial and matter-of-fact manner" than he would with "virtually any other client of mine" (Submission, at para. 59). As noted by Scanlan, J.A. in the Appeal Decision, the Member "chalks" up the comments to "banter between himself and a long-time friend/client" (at para. 29).

104. The Member professed that calling the Applicants' counsel "idiot boy" and "asshole" did not connote any lack of respect on his part. That, however, misses the point. What matters is how this language would be perceived by the profession and the wider community and their effect on the administration of justice. This point was made very clearly by Scanlan, J.A. in the Appeal Decision at para. 29-30:

> The materials filed by Mr. Robinson in the taxation of his client's accounts disclosed that Mr. Robinson was unprofessional in his communications, even with his clients. This relates to the descriptions of opposing counsel and even judges of the trial court. The lack of awareness and concern he demonstrates respecting the impact those comments may have had on this litigation and his profession is concerning. He chalks it up to banter between himself and a long-time friend/client. The comments may well help explain the tortuous course of this litigation. Such cavalier and unprofessional assessments of other litigation participants can lead to a false sense of optimism for clients.

> His clients continued with this hugely expensive litigation as Mr. Robinson continued to portray himself as being the only professional involved in that application process with the ability to predict or influence the outcome. Others were variously described by him as "a...holes", "idiots" or "pansies". These statements were more than unprofessional. They represented what the hearing judge described as "abject disrespect for counsel opposite and the judges". The ill-founded bravado by the appellant would have done nothing to deter his clients from continuing down into the abyss that awaited them, with Mr. Robinson's assessment of himself lighting the way.
>
> (emphasis added)

105. Count 2 does not charge the Member with contravening Rule 5.6-1 which sets out the duty of a lawyer to encourage respect for the administration of justice. The comments about the Applicants' counsel could easily be said to be a significant failure to encourage respect for the administration of justice. But, as the Member was not charged with contravening Rule 5.6-1, the Panel cannot find that his conduct in this respect amounts to professional misconduct by virtue of that Rule.

106. Rule 7.1-1 which the member is charged with violating seems to be on its face to be inapt to cover the e-mails the Member sent to KL. The Rule seems to be directed to the conduct of a lawyer when dealing directly with opposing counsel. It does not squarely fit a situation where a lawyer makes pejorative comments about opposing counsel to his own client.

107. Rules 2.1-1 and 2.1-2 are the Rules that have relevance here. Rule 2.1-1 states that:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the procession honourably and with integrity.

108. Commentary [2] to Rule 2.1-1 states:

> Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

109. Commentary [3] points out that:

> dishonourable or questionable conduct by a lawyer in professional practice will reflect adversely upon the integrity of the profession and the administration of justice.
>
> (emphasis added)

110. Rule 2.1-2 speaks of the lawyer's duty to "uphold the standards and reputation of the legal profession". The comments the Member made about opposing counsel came out of a "palpable dislike" of Mr. Keith. As both Moir, J. and the Court of Appeal noted, they are comments showing "abject disrespect".

111. Such comments, even though initially made privately to a client, but later disclosed by the client, do not reflect favourably on the Member or the profession. They are completely contrary to the ethos that the rules embodied in the Code try to promote. They were made in breach of the duty established in Rule 2.1-1 of the lawyer to carry on the practice of law "honourably and with integrity". As Commentary [2] states:

> A lawyer's conduct should "reflect favourably on the legal profession".

112. Disparaging opposing counsel in conversations with his client, the Member was not carrying on the practice of law "honourably and with integrity" and his conduct did not reflect favourably on the legal profession. His conduct reflected most unfavourably on the profession because it treated the litigation as an occasion to engage in juvenile name calling. It, moreover, constituted a failure to uphold the standards and reputation of the legal profession contrary to Rule 2.1-2.

113. The Panel finds that the Member's conduct in referring to the Applicants' counsel as "idiot-boy" and "asshole" was in breach of Rules 2.1-1 and 2.1-2.

114. The e-mails that the Member sent to KL also disparaged judges of the Supreme Court of Nova Scotia. The Society has alleged that the Member is guilty of professional misconduct by referring to Nova Scotia judges as "pansies" and questioning if Justice Lynch would have any "balls". The Member has not denied that he made those comments. In his submission he said:

> I used the word "pansies" when referring to judges in a summary judgement hearing context, and I wondered whether or not a certain judge has any "balls" in the same context.

115. The Member has argued that the fact these comments were made "within the most sanctified of all communication – solicitor-client". It is absolutely clear that solicitor-client privilege has been zealously guarded by Canadian courts and particularly by the Supreme Court of Canada in a lengthy line of cases. But it is also clear that the privilege is that of the client, not the lawyer. If the client chooses to disclose solicitor-client privileged communication that is the client's right. The lawyer cannot prevent it. Consequently, the fact that these comments may have been made in communications that were initially protected by solicitor-client privilege is rendered irrelevant by the fact that the client, the possessor of the privilege, disclosed them in the course of the taxation of the Member's accounts.

116. The fact that the comments were made in private communications that the Member did not expect to be disclosed is of no moment. Of course, if they had remained private, they could not have been the subject of complaint by anyone other than the client. But they have become public as a result of their disclosure by the client in the taxation proceedings. In the case of *Histed v. Law Society of Manitoba*, 2007 CarswellMan 504, a lawyer, in a letter to opposing counsel marked "Strictly Confidential and Without Prejudice" said "[Justice A], frankly, is a bigot". The lawyer who received the letter forwarded it to a senior lawyer in the Federal Department of Justice who, in turn, sent a copy of the letter to the Law Society of Manitoba. The Law Society instituted charges of professional misconduct.

117. The lawyer was later found guilty of professional misconduct. His appeal from the panel of the Discipline Committee of the Law Society was dismissed. One of the arguments raised by the lawyer was that the letter was private and could not be used by virtue of the *Privacy Act*. This argument was rejected by the Court of Appeal on the ground that opposing counsel was in the possession of the letter with the lawyer's consent.

118. Consequently, we consider the fact that the comments alleged to be violations of the Code were made initially in private communication is not relevant. The comments are now public and it is that fact that is relevant. It is because they are public that they are capable of having adverse effects on the integrity and reputation of the profession. Although no argument has been made here

with respect to any statutory right of privacy, we consider that the basic point of *Heisted* is relevant here. A communication that is disclosed so that it is public can be the basis for a finding of professional misconduct.

119. The Member has referred to the Supreme Court's decision in *Doré v. Barreau du Quebec,* 2012 SCC 12 which held that a lawyer's expressive rights are protected under the *Canadian Charter of Rights and Freedoms*. As Abella, J., stated in delivering the judgment of the court:

> Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.
>
> We are, in other words, balancing the fundamental importance of open, and even forceful criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise."

120. At paras. 65-66. There is no doubt that judges are not above criticism. Abella, J. noted in *Doré:*

> Discipline "does not automatically flow from criticizing a judge or the judicial system". Such criticism, even when expressed robustly, can be constructive". (at para. 69).
>
> In disciplinary hearings such as this one, criticism of judges "will be measured against the public's reasonable expectations of a lawyer's professionalism, i.e.. that a lawyer will speak their minds with "dignified restraint" (at para. 68, 69).

121. The expressive rights of a lawyer are a crucial component of the lawyer's duty of resolute advocacy. In *Doré*, Abella, J. referred (at para. 70) with approval to what the Disciplinary Council of the Barreau du Quebec said:

> The Disciplinary Council recognized that a lawyer must have [TRANSLATION] "total liberty and independence in the defence of a client's rights", and "has the right to respond to criticism or remarks addressed to him by a judge", a right which the Council recognized "can suffer no restrictions when it is a question of defending clients' rights before the courts.

122. In these particular circumstances, however, the concept of resolute advocacy has no application. The impugned comments of the Member were not uttered in the courtroom nor in written submissions to the court. They were not even addressed to the presiding judge as in *Doré.* Rather they were made in e-mails to the Member's client, an even further remove from any context of advocacy. They may have been made in course of discussion on the prospect of summary judgment, but in tone and content, they were not an essential part of the discussion. They were insults, pure and simple. The Member certainly enjoyed expressive freedom, but these comments showed an "abject disrespect" for the court and the administration of justice in this province and went for beyond the "dignified restraint" referred to by Abella, J. in *Doré.*

123. The Member defended his use of the term "pansies" in a primarily horticultural way referring to the sensitivity of pansies as flowers. In his submission the Member stated at para. 109:

> The word "pansy" is part of the English vernacular, and it is often used to refer to someone (or a group of people) who lack courage, guts, nerve…etc. In other words it is used to describe people who, either in general or with reference to a certain event or issue, may not approach difficult situations with toughness, or at least as much toughness as the other party would like.

124. This argument, with respect, ignores the fact that the term "pansy" when describing a person is initially always used in a pejorative sense. It is not a neutral expression used to describe someone who lacks courage. It is deployed as an insult. The Member has gratuitously insulted the judges of the Supreme Court of Nova Scotia. This conduct is beyond any reasonable latitude that must be accorded to a lawyer as part of his constitutionally guaranteed freedom of expression. The Panel finds that the following statement by Scanlan, J.A. in the Appeal Decision (at para. 49) to be particularly apt:

> How the appellant conducted himself leading up to and during the merits hearing and also in this appeal goes to the heart of the integrity of the justice system, demonstrating conduct that is beyond

> reasonable contemplation, even in the context of the most contentious litigation."

125. The other comment with respect to a judge with which we are concerned is the Member's rhetorical question whether a certain judge had "balls". It is clear that in the context in which this comment was made, it was meant as an insult. It was offensive to a respected judge of the Supreme Court. In the circumstances of this case that particular way of asking if the Judge would grant a motion for summary judgment albeit in an offensive way is beyond the degree of latitude to be afforded a lawyer. It beyond the "public's reasonable expectations of a lawyer's professionalism": *Doré*, at para. 69. Consequently, the Panel must conclude that it amounts to professional misconduct.

**The AB Complaint – Case Management Conference**

126. The second of the two sets of particulars set out in Count 2 relates to the Member's conduct at a case conference that occurred on December 11, 2018. The case conference concerned a child protection matter involving the children of KB which began in the late summer of 2018. Initially a legal aid lawyer represented KB. There were two interim court hearings in which affidavits from the social workers involved were presented to the court. There was no cross-examination on the affidavits although there was an objection to the placement of the children with a specific foster family.

127. By October 2018 KB was represented by the Member although the first correspondence AB had was with an associate of the Member. AB testified that when the Member became involved, his tone was firm but as the file went on his tone became more harsh and eventually became "abusive". According to AB the Member in his correspondence and telephone calls with AB was demanding answers "immediately" or within an unrealistic time period. At one point AB testified that the Member screamed at her over the phone.

128. Because of the tone of their interaction was so harsh, AB sought advice and assistance from her supervisor who recommended in late November that AB have a colleague with her whenever she met with the Member. AB testified that she had received correspondence from the Member that she found offensive. AB testified that she had never before in her legal career received that type of correspondence from a lawyer. By the end of November she was very uncomfortable in

her dealings with the Member. She said she had never been spoken to by anyone like the Member had.

129. As AB noted child protection is a very emotional field with heated encounters with various participants not being uncommon. AB has long experience in child protection matters having acted for the Minister of Community Services as a lawyer with the Department of Justice for 10 years. Consequently, she would be somewhat accustomed to emotionally fraught situations involving family members. She said it was uncommon for the person escalating the emotional level of a proceeding to be a lawyer.

130. The interim orders with respect taking the children into care were granted on December 4, 2018. Leading up to the case conference there was correspondence between AB and the Member and in particular an e-mail from the Member to AB dated December 6, 2018. The e-mail contained a number of pointed criticisms of the professional conduct of the social workers involved. AB took issue with the substantive criticisms made by the Member primarily because she did not believe, from her experience with the social workers, that they would do the things alleged by the Member.

131. What particularly troubled AB was a concluding statement from the Member that he was looking forward to the case conference. As the e-mail consisted of a series of pointed assertions of misconduct by the social workers, AB did not think it was "appropriate" to say that the Member looked forward to the meeting. Given his criticism of CD, one of the social workers, and his clearly expressed belief that she was not doing her job properly, AB regarded the Member's statement about looking forward to the case conference as being "disingenuous" and foreshadowed confrontation.

132. The case conference was convened by AB. The Member and the lawyer representing the guardian ad litem of the oldest child agreed to attend.

133. In addition to AB and the Member, the case conference was attended by EF, a colleague of AB, the social worker CD; CD’s manager; GH the lawyer representing the guardian ad litem; JK the guardian ad litem; LM who had just become involved with KB as a counsellor and someone described by LM as a "young girl" with the Association of Black Social Workers (she was later identified as NO).

134. The case conference was meant to provide an opportunity for everyone involved to work collaboratively to resolve what is always a difficult and contentious matter. Its goal was a conciliatory one. In most cases conferences the parents are present.

135. This particular case conference did not begin in an auspicious way. The Member who had never before been involved in a child protection matter, immediately accused AB of not telling him that he should bring his client, KB. She in fact had suggested this in a previous e-mail. The situation deteriorated further.

136. AB testified that she had never seen a lawyer conduct himself in the way the Member did. He kept raising his voice, "name called", made demands and asked questions as if he were engaged in an aggressive cross-examination. He banged his fist on the table. The name calling consisted of referring to some conference participants “stupid” and “dumb” or words to that effect.

137. The Member was highly critical of CD’s handling of the matter, accusing her of bias and making improper judgments against his client. Allegations of a similar nature were made against JK, the guardian ad litem. There was, in AB’s view, no evidence ever presented by the Member to show bias.

138. AB testified that in the chaotic atmosphere of the case conference the Member's face became red and "you could see his veins". At one point AB told CD not to answer the questions which had been posed by the Member in an aggressively cross-examination manner. Eventually AB ended the conference because she said it was "becoming scary".

139. When someone protested the nature of the Member's behavior, the Member's response was "welcome to the real world" or "get used to the real world". AB testified that she was flabbergasted by this response.

140. AB believed that the Member was trying to intimidate the participants in the case conference. The Member's conduct, in AB’s view, was beyond an acceptable threshold. AB testified that she sees zealous advocacy all the time, at times with raised voices, but not to the same degree as happened with the Member at the case conference. In her view the repeated baseless allegations made by the Member constituted abuse and were attempts at intimidation.

141. The second witness to testify with respect to the matters raised in Counts 2 arising out of the AB complaint was EF who was a colleague of AB on the child protection team. She has been 32 years at the bar; 14 years in private practice and 18 years in child protection. EF testified that the Member was the last participant to enter the conference room where they case conference was held. He looked around and immediately accused AB of not telling him that his client should be there. AB responded that the agenda for the conference referred to the fact that there would be an opportunity for the parents to meet those involved.

142. According to EF, the Member appeared to be agitated. He was very loud and pointed his finger at AB. He was very aggressive and accusatory in the questions addressed to CD. Those questions were yelled out in a rapid fire manner that did not permit CD an opportunity to answer.

143. EF testified that she was used to rigorous cross-examination but she had never experienced anything like what she witnessed from the Member at the case conference. She had never seen that level of anger in a lawyer.

144. In EF's view the Member exhibited a lack of respect, an unwillingness to listen, anger and an inability to bring himself down to an acceptable level. Responding to a question from the Member in cross-examination EF told him that "You are so angry". She was even concerned about "how are we going to get all these people out of this room". She never had such concerns about a lawyer before.

145. GH, who was called to the Bar in 2014, also testified. She has acted as counsel for guardians ad litem for five or six years. She agreed with both AB and EF that the conference got off to a rocky start. She noted that the Member said he was unaware that he could have had the parents there. When AB was looking for an item of correspondence on that issue, the Member told her that "He didn't care to see her verbiage."

146. GH said that the situation "snowballed" from there. The Member was very aggressive making a number of accusations to those in attendance. She testified that she had never seen another lawyer or other professional behave in that way. When there was a protest at this conduct, the Member replied, "Welcome to the real world".

147. According to GH while the Member was not yelling, he was not speaking in a calm tone. On cross-examination GH testified that she did not recall the Member screaming. He was, however, sneering and appeared to be angry and getting angrier throughout the course of the meeting.

148. Attempts by EF and LM to de-escalate the situation were not successful. Referring to the conduct of the Member in relation to the guardian ad litem, JK, GH said JK would have been used to being cross-examined but the Member's conduct went beyond anything she had experienced in a case conference with one exception. The worst experience she had experienced occurred when a respondent assaulted participants in a case conference. GH ranked this conference as the second worst case conference she had experienced.

149. In his evidence, the Member explained that although he had no previous experience in child protection matters, he agreed to represent KB because it was a travesty and that KB's treatment was due to a racist system. He wanted to do everything he could do to put pressure on the Minister of Community Services and the Agency. He treated the case conference as an opportunity to get it across to the Minister that he would not be messing around. In the Member's view there was never going to be anything productive out of the case conference unless the Minister admitted that the child protection proceedings were a mistake. In this connection the Member testified that he thinks of himself as formidable and intense.

150. With respect to the case conference itself, the Member entered the conference room with LM and NO both of whom he had met for the first time just before the case conference. When he entered the Member said that he saw the "gang" together. He described the lawyers and social workers in attendance as "compadres".

151. The Member testified that he asked pointed questions of CD, the social worker but according to the Member she would "deny or deflect". He also made accusations of bias. When AB objected to more pointed questions, he indicated that if participants did not like the conference they could leave. The Member agreed that he interrupted participants but said AB interrupted him.

152. The Member testified that AB was "dead right" about advising him that his client's were expected to attend the case conference and he was "absolutely wrong". AB had sent an e-mail to

the Member to that effect. He also testified that he might have said to AB "I'm not interested in your verbiage."

153. The Member testified that he regarded the case conference as an opportunity to see the individuals involved so he could discover why a social worker would do this to a client. This is what he was referred to when he advised AB in his December 6, 2018 e-mail that he was looking forward to the meeting.

154. The Member testified that he did not have a "small voice"; he had a voice that carried. He admitted in his evidence to raising his voice but denied yelling or screaming. He also conceded that he spoke over people but that "went both ways."

155. The Member did not regard the case conference as a collaborative process. He said he was not there to figure something out. The Member also seemed to concede that he was angry at the case conference. He attributed his anger to the fact that he did not get the answers that he wanted at the case conference. He was angry because he was not getting what he considered appropriate responses to the points raised in his 12 page letter dated to AB.

156. The Member accepted that he laughed at the answers to the allegations he had made against the guardian ad litem, JK. The Member denied that he scoffed at some answers saying that he did not know what scoffed means. What is especially telling is that the Member made that comment in a plainly scoffing manner. In his testimony the Member admitted to using the phrase "Welcome to the real world" saying "That's what I said". The real world for litigators is according to the Member a "rough and tumble world". It is not a "tea party" the Member said, echoing Moldaver, J. in *Groia.*

157. The Member said in his testimony that he may well have laughed when EF mentioned that she had mentioned that she had been a lawyer for 29 years. He added that he "didn't think much of EF's observations".

158. The Member testified that he made accusations against CD in court, in writing and he certainly was clear that he made allegations in the December 11, 2018 conference. He considered that there was nothing inappropriate about a lawyer illuminating unethical conduct. The Member

said that AB did not like the accusations. He added that he considered that because AB had worked on over 50 files with JK, she was as biased toward JK as JK was to the Agency.

159. The Member called LM to give evidence with respect to what happened at the case conference. LM gave her evidence via Zoom. LM has a private counselling practice and became involved with KB as a private counsellor. She had met the Member just before she "opened the door" to the building. With respect to the Member's conduct at the case conference LM did not believe it was typical for a lawyer to question a participant in the way he did but she did not consider it to be inappropriate because he was defending his client. In LM's view the Member was firm and direct and "not at all out of line".

160. As to the tone of the Member's voice, LM observed that he was a man and was "loud even now", meaning during the hearing. LM did not recall the Member screaming, yelling or pounding the table. She did not remember the Member being red in the face.

161. LM related a conversation that she had with AB and EF where she said "if I needed a lawyer, he [i.e. the Member] would be the one that I would want."

162. LM testified that she sat next to the Member at the conference table. She did not remember the Member pointing his finger or raising himself up from the conference room table. In LM's view that would be a threatening gesture.

163. In cross-examination LM said that she did not expect to hear about the matter in the future. She did not want to remember it, saying it was one of the most terrible cases that she had seen because of the way that client was treated.

164. The Panel accepts that the Member honestly believed that his clients were the victims of governmental overreach. The Panel is also acutely conscious of the need to protect the ability of the lawyers to use strong language and raise concerns about the integrity of the process with which their clients are confronted. To paraphrase Moldover, J. in *Groia,* we must take care "not to conflate the strong language necessary to challenge "the conduct of a participant in the justice system with the type of communication that warrant a professional misconduct finding" (at para. 101).

165. In doing so we must adopt a context-specific approach to evaluating the Member's conduct during the December 11, 2018 case conference. In *Groia*, Moldover, J. stated at para. 118:

> The flexibility built into the Appeal Panel's context-specific approach to assessing a lawyer's behaviour allows for a proportionate balancing in any given case. Considering the unique circumstances in each case - such as what the lawyer - said, the context in which he or she said it and the reason it was said - enables law society disciplinary tribunals to accurately gauge the value of the impugned speech. This, in turn, allows for a decision, both with respect to a finding of professional misconduct and any penalty imposed, that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.

166. In *Groia* the Law Society's disciplinary panels held that Mr. Groia was guilty of professional misconduct because his accusations of prosecutorial misconduct were not reasonably based. There was no question of his good faith; that was accepted by the Appeal Panel. The Supreme Court held that the Appeal Panel's finding that there was not a reasonable basis for the accusations was an unreasonable conclusion.

167. The Supreme Court adverted to two other matters that dictated a finding that Mr. Groia "did not engage in professional misconduct on account of incivility", namely:

(a) the "uncertainty surrounding the manner in which abuse of process allegations should be raised" (at para. 123) and

(b) the fact that the trial judge "took a largely hands off approach and did not direct Mr. Groia as to how he should be bringing his allegations" (at para. 124).

168. In this matter, the fact that accusations were levelled against some of the participants at the December 11, 2018 case conference by the Member are not the basis of the violations of the Code set out in Count 2(b). This count is concerned solely with the behaviour of the Member at the case conference. In these circumstances the validity of the accusations is not a relevant consideration. It is not what he said but how he said it.

169. Having heard and considered the testimony of the various witnesses, the Panel prefers the evidence of AB, EF and GH over that of the Member and LM. The Member's evidence is, in essence, consistent with much of the evidence given by AB, EF and GH. We accept that LM was entirely truthful and helpful in her evidence but as she was seated beside the Member at the case conference she did not experience the full force of the Member's conduct as did the others at whom it was directed.

170. The Member in his closing argument intimated that the Panel should not accept the evidence of AB, EF and GH because as they worked together they had the opportunity to discuss their evidence and agree to present a common front against him. He also noted that EF was present during AB's testimony. There is no evidence that these three lawyers somehow conspired to concoct evidence in order to "get" the Member.

171. The case conference was intended to be an occasion for all those involved in this particular child protection matter to collaborate with a view to finding a resolution. The Member came to the conference with no intention to collaborate. He wanted to use the case conference to show that he was a formidable litigator who would not be messed with. He was there to "throw down the gauntlet." He viewed the lawyers and the social workers present as, in essence, conspirators that were biased against his client.

172. He set the tone for the conference from the very start. He accused AB of not advising him that his clients should attend. When she tried to find and present the e-mail she had sent him on this point, he replied, "I'm not interested in your verbiage." He admitted in his testimony that AB was "dead right" on this issue. The Member may not have yelled or screamed but he raised his voice and pounded the table and talked over them. By his own admission he became angry because he did not get the answers that he demanded to the questions he asked.

173. AB and EF intervened in order to restore some semblance of decorum after a series of rapid fire questions posed in an aggressive cross-examination fashion. They were talked over or laughed at. At one point he said to a participant "Welcome to the real world."

174. The Panel accepts the evidence that the Member's conduct was aggressive and sneering. It also accepts the evidence that the Member scoffed at statements made by AB and adopted a mocking tone with the others in the conference.

175. The Panel considers that the way the Member gave evidence at the hearing strongly supports these findings. For example, he denied that he knew what "scoff" meant in a plainly scoffing manner which suggested that he knew exactly what "scoff" meant. The Member's evidence on many occasions was given in a manner with calculated asides and digressions that suggested to the Panel that he regarded the hearing as a performance and things were said or done so that they would have a performative effect. The Member's conduct at the case conference was intentionally formulated to show how formidable a litigator he was and to intimidate and bully the lawyers representing the Minister and the guardian ad litem. The Panel agrees with the comment of AB that the manner of the Member was abusive. It was far removed from the conduct one should expect from a lawyer and, especially an experienced litigator.

176. The Panel therefore finds that the Member during the case conference breached Rule 7.2-1 by failing to act with courtesy and civility with all persons with whom he had dealings in the course of his practice. As commentary [2] notes "Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system". Behaving in an intimidating or bullying fashion also represents a profound failure to uphold the standards and reputations of the legal profession. The reputation of the legal profession would only diminish if abusive conduct of the kind exhibited by the Member were found to meet the standards of the profession. If the intimidation and the bullying of participants in the justice system were recognized as an appropriate way to deal with other participants in the justice system, the adverse effect on the rational truth seeking functions of the justice system would be severe.

177. The Panel earlier in this decision discussed the scope of Rule 2.1-1. In relation to the conduct of the Member at the case conference, Rule 2.1-1 and Rule 2.1-2 tend to overlap. Rule 2.1-2 focusses on the standards and reputation of the legal profession as an aspect of the duty of a lawyer to carry on the "practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity. "Commentary [2] states that the conduct of a lawyer should reflect favourably on the legal profession and inspire the

confidence and respect of clients and the community. Bullying, abuse and intimidation reflects unfavourably on the legal profession and diminishes the confidence and respect of the community that the lawyer and the legal profession should enjoy. The Panel, therefore, concludes that the Member's conduct during the case conference contravened Rules 2.1-1 and 2. 1-2.

**Count 3**

178. This count relates to the same matter as the case conference; the child protection matter involving KB. The conduct on which Count 3 is based occurred in a photocopy room at the Devonshire Court House after a settlement conference. This incident only involved AB and the Member. In addition to hearing from AB and the Member about this incident, a surveillance recording that showed the incident was introduced into evidence. The recording did not have audio, it was solely a video.

179. AB testified that after the settlement conference ended, the Member spoke to AB saying that he wanted AB to give directions to CD, the social worker with respect to KB's children. The Member followed AB into the photocopy room and repeated those statements. According to AB he was yelling. AB asked him to leave. The Member then left but shortly after returned to reiterate his demands and leaned in towards AB (closer than three feet) who put her hand up as a gesture to keep him away. The Member left again but returned a very short time later and again was issuing directives that AB should tell CD what she was to do or not do. When AB said that she would not issue directions to CD who would govern herself accordingly, the Member seemed to become agitated. The Member then said "If you don't tell CD what to do you'll be sorry" or words to that effect. AB regarded the "You'll be sorry" remark as a threat to her physical safety.

180. The Member testified that AB was right that he wanted her to give directions to CD. He said he thought that AB would not have a problem with doing this "favour". The Member thought AB was looking at him with disdain.

181. When the Member followed AB into the photocopy room, he agreed that she said "go away". They were having a heated exchange and agreed that AB said that she would not relay his directions or concerns to CD.

182. The Member accepted that he leaned in towards AB "to make a point". He acknowledged that he was frustrated when he leaned in and he accepted that he "got too close" and should not have done that. He did not accept that he yelled at AB because as his voice carries, he did not need to yell.

183. The video evidence supports AB's version of the events in the photocopy room. Clearly there was a heated exchange between AB and the Member. It is also clear that the Member got very close to AB while at the same time making forceful comments. As the Member conceded, he was too close and he should not have done it.

184. Count 3 alleges that the Member violated four Rules namely Rules 2.1-1, 2.1-2, 6.3-4 and 7.2-1. We will deal with the latter two rules first. Rule 6.3-4 states that "A lawyer must not engage in any other form of harassment of any person". As Rule 6.3-4 follows immediately after Rule 6.3 which deals with sexual harassment, "any other form of harassment" must mean any form of harassment other than sexual harassment.

1. Rule 6.3-2 provides that a term used in Rule 6.3 that is defined in human rights legislation in force in Nova Scotia has the "same meaning in this legislation". The Nova Scotia *Human Rights Act* defines "harass" to mean "to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome".

185. The Member was certainly aware that his conduct and comments were "unwelcome". AB asked him to go away. His conduct was also vexatious because AB was obviously irritated or annoyed by what the Member did and said in the photocopy room. Did it constitute a "course of conduct"? The Panel considers that it did. The conduct was not a "one off"; it occurred three times. Instead of doing what AB asked in their initial encounter, and "gone away", the Member returned twice more. That is sufficient in the Panel's view for the Member's conduct to be regarded as a "course of conduct".

186. The repeated demands made by the Member to issue directives, the fact that the Member came too close to AB, together with the threat that AB would be sorry if she did not comply with his demands is ample evidence that the Member harassed AB contrary to Rule 6.3-4.

187. Rule 7.2-1 required the Member to be courteous and civil with all persons with whom he has dealings in the course of his practice. He was neither courteous nor civil with AB. His conduct was an example of bullying, a conclusion reinforced by his "You'll be sorry" threat. When taken together it is apparent that the Member was not engaged in zealous advocacy on behalf of his client but intimidation. Somehow he believed that the conduct he exhibited in the photocopy room would aid his client's cause. Such conduct often has the complete opposite effect. As Moldaver, J. noted in *Groia* "civility is often the most effective form of advocacy" (at para. 76).

188. The Panel does not consider that a finding that the Member breached Rule 7.2-1 will "not chill the kind of fearless advocacy that is at times necessary to advance a client's cause". Requiring a lawyer to refrain from bullying or intimidation tactics cannot be too high a threshold: *Groia,* at para. 76.

189. The scope of Rules 2.1-1 and 2.1-2 have been discussed above. In relation to the photocopy room incident what is especially troublesome is the threatening atmosphere that the Member created by his "too close" approach to AB while engaged in a heated exchange in a small photocopy room from which he blocked the only exit, and his "You'll be sorry" threat. Threatening conduct is surely the antithesis of behaving honourably and with integrity. And there would be few types of conduct more calculated to diminish the reputation of the legal profession than one lawyer threatening another. Consequently the Panel find that the Member breached Rules 2.1-1, and 2.1-2 by reason of his conduct in the photocopy room.

**Count 4 – Staring at a Witness**

190. Count 4 of the complaint alleges that the Member violated three rules during the cross-examination of a witness in the *Gallagher Holdings* matter. It is asserted that by “staring at a witness” while at the same time swearing under this breath, the Member:

(a) failed to discharge with integrity the duties and responsibilities he owed to clients, the court, the public and other members of the profession (Rule 2.1-1);

(b) failed to be courteous and act in good faith to the tribunal and all persons with whom he had dealings (Rule 5.1-5); and

(c) failed to encourage public respect for administration of justice (Rule 5.6-1).

191. Count 4 also refers to violations of Rule 5.1-2 but as no effort was made by the Society to show how the alleged conduct of the Member contravened any of the 16 strictures specified in Rule 5.1-2, the Panel does not consider it necessary to consider that Rule further.

192. The specific incident from which the Count stems was not mentioned by Moir, J. in his Costs Decision. It was the basis of a complaint of professional misconduct made to the Society by the witness himself. Consequently, it was the only incident from the *Gallagher Holdings* matter that was the subject of viva voce evidence.

193. The witness testified that he was cross-examined by the Member's associate. In the courtroom the Member was seated behind and slightly to the left of his associate. The witness stated that he did not hear anything that the Member said. As he put it, he did not know what was said but he knew it wasn't good from the Member's facial expression. In his evidence the Member said that his statements at the time were directed at his associate, not the witness.

194. The witness stated further that the fact that the Member may have stared at him did not make him feel bad. He expressed the view that he thought it "happens all the time". Moreover the incident, such as it was, had no impact on his perception of the legal or judicial system.

195. Inasmuch as the witness did not hear anything that was said, there is simply no proof that the Member swore under his breath. The Panel does not accept that the Member stared at the witness in a manner that could suggest an attempt to intimidate the witness. The Member was merely looking intently at the witness in order to gauge his demeanor while under cross-examination. In these circumstances, it cannot be said what occurred during the cross-examination of the witness constituted a failure to encourage public respect for the administration of justice. This aspect of Count 4 is therefore dismissed.

**Count 5**

196. The subject matter of Count 5 is a text message that the Member sent to his client, KL that stated:

> Our case is over … all that remains is our closing argument ... and I don't have to give one, as I have already filed a comprehensive legal brief. Your refusal to pay me will cause me to rethink my approach to whether or not I give a closing argument. I have already done an incredible amount of work without pay, and I have no legal or ethical obligation to do any more. You are playing with fire.

197. This text message was sent as a result of the Member's frustration over not receiving payment from his client for the work he had done. The client had stopped paying the Member's accounts nine months before the hearing. The Member considered that the client had lied to him about obtaining the funds to pay him. Although the Member had filed a closing brief on behalf of the client, to use his own words, he "threatened to not give a closing argument". The Member described the threat as a "baseless" one and noted that he was on his feet for six hours delivering the closing argument. He was just trying to get some leverage in order to get paid. The Member testified that he felt compelled to do the right thing and "keep going" with his representation even though he believed the court, if asked, would let him withdraw.

198. Count 5 alleges that by sending this text message, the Member contravened Rules 3.2-2 and 7.2-4 of the Code. Rule 3.2-2 states:

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

199. Rules 7.2-4 provides as follows:

> A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

200. With respect to Rule 3.2-2, a lawyer cannot be considered to be honest and candid if he sends his client a baseless threat i.e. one he does not intend to carry out. He is lying to the client in order to obtain payment. Although the Member was frustrated by the client's failure to pay, making a baseless threat was not a justifiable response to that situation.

201. The question that must be answered when considering Rule 7.2-4 is whether the baseless threat is "abusive, offensive or otherwise inconsistent with the proper tone of a professional

communication from a lawyer". Lawyers often have to advise clients that if the client does not pay proper accounts or if the client does not follow the lawyer's advice the lawyer will have to withdraw. A client may regard such communications as threats, but they are neither abusive nor offensive if they are made in a respectful way at any appropriate time.

202. Here the communication is a baseless threat. It is both abusive and offensive. The threat was made when the lawyer-client relationship was still subsisting. It was also made at the end of an arduous hearing when the client could do little, if anything, to respond to the threat which he could not know was baseless. The text message also denied that the Member had a "legal or ethical obligation to do any more". This was said even though, according to the Member, he intended to carry through with his representation. The closing sentence, "You are playing with fire", merely served to heighten the intended effect. The very fact that the Member would threaten a client even though he did not intend to follow through with the threat, coupled with the denial of any legal or ethical obligation to do the closing argument, makes the text message both abusive and offensive. The Panel finds that the Member has contravened both Rules 3.2-2 and 7.2-4.

**Summary**

203. The Panel has found the Member to be guilty of professional misconduct in respect of Counts 1, 2, 3 and 5 of the Complaint. The Panel has found the Member to be not guilty of professional misconduct in respect of Count 4.

204. In relation to Count 1 the Panel has concluded that the Member

1) failed to discharge with integrity the duties and responsibilities be owed to clients, the Court, the public and other members of the profession contrary to Rule 2.1-1 of the Code;

2) conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice contrary to Rule 2.1-1 of the Code;

3) failed to treat the Court with candour, fairness, courtesy and respect contrary to Rule 5.1-1 of the Code;

4) failed to be courteous and act in good faith to the tribunal and all persons with whom he had dealings contrary to Rule 5/1-1 of the Code; and

5) failed to encourage public respect for the administration of justice in the manner in which he conducted himself in the *Gallagher Holdings* matter.

205. All of these elements of Count 1 relate to the Member's conduct in the *Gallagher Holdings* matter. With one exception, the Panel had found that the Society has proved each of the particulars set out in Count 1. The Member's conduct was far from the norms of behaviour that are expected of a lawyer even allowing for an appropriate degree of latitude.

206. The Panel has found that the Member did not commit professional misconduct in filing an incomplete affidavit.

207. Count 2 relates to two matters, namely the *Gallagher Holdings* matter and the events described in the complaints involving AB. The Panel has determined that the Member is guilty as alleged in Count 2, specifically, the Member

1) failed to discharge with integrity the duties and responsibilities he owed to clients, the Court, the public and other members of the profession contrary to Rule 2.1-1 of the Code;

2) conducted himself in a way that reflected adversely on the integrity of the profession and the administration of justice contrary to Rule 2.1-1 of the Code; and

3) failed to be courteous and civil and act in good faith with opposing counsel by engaging in aggressive and disrespectful behaviour contrary to Rule 7.2-1 of the Code.

208. The Member's conduct, in both the *Gallagher Holdings* matter and the events described in relation to the complaints involving AB, was evaluated separately by the Panel. In other words, the members of the Panel considered the particulars related to the two different matters on their own merits. The findings in relation to the *Gallagher Holdings* matter were not used to evaluate the particulars related to the AB matter and *vice versa.*

209. The Member's conduct, when evaluated separately, was conduct that demonstrated a profound failure by the Member to appreciate the effect his conduct could have on others and a failure to appreciate that as a lawyer he has an obligation to the Court, other members of the profession and the administration of justice to conform to the higher standards expected of a lawyer.

210. Count 3 related to an incident that occurred at the Devonshire Avenue Courthouse involving AB. The Panel has concluded that the Member's conduct fell well below the standard expected of a lawyer in dealing with opposing counsel. The Member's conduct smacked of bullying and intimidation. Consequently, the Panel has found the Member to be guilty of professional misconduct as alleged in Count 3.

211. Count 4 alleged that the Member's conduct during the cross-examination of a witness amounted to professional misconduct. The Panel held that the Society failed to establish that what had occurred amounted to professional misconduct. Count 4 was, therefore, dismissed.

212. The final count in the Complaint, Count 5, related to an e-mail sent by the Member to his client in the *Gallagher Holdings* matter. The Member, at the conclusion of the hearing, advised the client that he would not give a closing argument because he had not been paid for some considerable time. According to the Member's testimony, this was a "baseless threat." It was, nonetheless, a threat. The Panel has found that this conduct has reached the level of professional misconduct. The Member has violated Rules 3.2-2 and 7.2-4 of the Code.

Dated at Halifax this 17th day of February, 2023.

(signed)
Harvey L. Morrison, K.C.
Chair of the Panel of the Hearing Committee
of the Nova Scotia Barristers' Society

I agree:

(signed)
Sarah Kirby

(signed)
Dr. Ian Reid