

LOCAL PROTOCOL FOR ALLEGATIONS OF INEFFECTIVE REPRESENTATION IN PROVINCIAL OFFENCES ACT APPEALS AT THE ONTARIO COURT OF JUSTICE IN ORANGEVILLE

Where a person appealing a *Provincial Offences Act* (POA) matter alleges that a lawyer, paralegal, or other person representing them at trial was either incompetent or by their conduct contributed to a miscarriage of justice, the following rules shall followed in the Ontario Court of Justice in Orangeville, unless a Judge of the Court orders otherwise.

Application of Protocol

This Protocol shall apply with respect to the rules to be followed in any *Provincial Offences Act* appeal before the Ontario Court of Justice in Orangeville where the appellant proposes to allege that their lawyer, paralegal agent or other representative at trial conducted themselves in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice.

Obligation to Investigate — Fair Opportunity to Respond

Before any self-represented appellant, lawyer or paralegal agent on appeal draws any final conclusion as to whether or not to make an allegation that the trial representative performed in a manner that amounted to professional incompetence, or otherwise contributed to a miscarriage of justice, the person acting on the appeal must:

- (a) satisfy themselves by means of personal investigations or inquiries that there is some factual foundation for this allegation. The person acting on the appeal should make these investigations or inquiries as soon as possible;
- (b) provide the trial representative with informal notice of the general nature of the potential allegations concerning the professional performance of the trial representative; and
- (c) give the trial representative a reasonable opportunity to respond to those potential allegations.

In this way, the trial representative will have a fair opportunity to respond to the potential allegations before they are made in any public forum.

Notice of Allegations to Trial Representative

Whenever person acting on the appeal decides to publicly assert by means of filing with the Ontario Court of Justice some document such as a Notice of Appeal or an Application that contains a claim that the trial representative performed in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice, the person acting on the appeal must first serve the trial representative with a copy of that document, and any other subsequent document that contains any further details of that claim. In this way, the trial representative will be fully apprised, in a timely way, of all

the allegations being made with respect to their professional performance in their representation of the appellant at trial.

Transfer of Trial File to Person Acting on Appeal

The trial representative shall, upon receipt of:

- (a) A written request by the person acting on the appeal and a written direction of the appellant, or
- (b) Any public document that contains an allegation of professional incompetence by the representative at trial in their conduct on behalf of the appellant, or
- (c) An allegation that the conduct of the trial agent otherwise contributed to a miscarriage of justice, whichever event is earlier,

forthwith transfer the entire file to the person acting on the appeal.

If the trial representative wishes to raise any objection to transferring the file, they may serve and file an application as soon as possible to the Provincial Offences Appeal Judge in Orangeville.

Access to the Trial File by Trial Representative

If the trial representative wants to keep a copy of all or some of the trial file before transferring it to the person acting on the appeal, the trial representative may, at their own expense, make copies of whatever documents they wish from the file. In addition, if the trial representative wants access to the file in connection with the appellant's case after it has been transferred to the person acting on the appeal, that person must facilitate this access to the entirety of that file in a timely manner, and must permit the trial representative to make copies, at their own expense, of whatever documents they wish from the file.

Materials Filed by the Appellant

The person acting on the appeal shall serve both the respondent and the trial representative and shall file any and all materials in support of an allegation of professional incompetence, or an allegation that the conduct of the trial representative otherwise contributed to a miscarriage of justice, with the Provincial Offences Appeal court as soon as possible, and in any case before the appeal is scheduled to be heard. These supporting materials may include any necessary transcript of the trial proceedings, an affidavit from the appellant, an affidavit from the trial representative, an affidavit from any other witness who had an opportunity to observe the relevant events, or any other relevant documentation.

The Examination of the Trial representative

Whether or not an affidavit from the trial representative has been filed by any party in connection with the allegation that the conduct of the trial representative amounted to professional incompetence or otherwise contributed to a miscarriage of justice, if any party wishes to compel the appearance of the trial

representative before the Provincial Offences Appeal court for purposes of cross-examining the trial representative on his or her affidavit, or examining the trial representative in the absence of an affidavit, upon this issue, any party may bring an application to a Judge of the Provincial Offences Appeal court, on notice to the trial representative and the opposing party, for an order compelling the appearance of the trial agent for purposes of such examination.

Compliance with Provincial Offences Appeal Rules

The procedure described in this Protocol does not relieve the person acting on the appeal of the obligation of perfecting the appeal in accordance with the applicable rules governing appeals under Parts I and II or Part III of the *Provincial Offences Act*.

Compliance with Procedural Rules

Where a party is having difficulty securing compliance with any of the Rules of this Protocol, the party at any time may seek directions from a Judge of the Provincial Offences Appeal court.

Judicial Variations of Procedural Rules

This Protocol outlines the Rules that generally govern the procedure to be followed with respect to any *Provincial Offences Act* appeal before the Ontario Court of Justice in Orangeville where the appellant proposes to establish that his or her representative at trial conducted himself or herself in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice.

Where a party is of the view, however, that the circumstances of the individual cases are such that one or more of the Rules outlined in this Protocol should not apply, that party may bring an application, upon notice to all affected parties, to a Judge of the Provincial Offences Appeal court for an order making any necessary modification to the Rules of the Protocol in their case.

EFFECTIVE DATE OF LOCAL PROTOCOL

It is anticipated that this Protocol will be in full effect as of February 18, 2022 and will apply also apply to all appeals currently before the court.

February 18, 2022

Mr. Justice Richard Schwarzl
Local Administrative Judge
Ontario Court of Justice at Orangeville