LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

CRIMINAL LAW STANDARDS

Constituted in 2013, the formal mandate of the Professional Standards (Criminal Law) Committee as approved by Council of the Nova Scotia Barristers' Society is as follows:

The Professional Standards (Criminal Law) Committee supports Council in the governance of the Society by developing professional standards for the area of criminal law.

These Standards and their featured resources are intended to be an articulation of the existing statutory and regulatory obligations for lawyers and to provide some guidance with respect to "how" a Standard might be met, taking into account the variances in practice around the province. Each proposed new Standard is first introduced to Council by the Professional Standards (Criminal Law) Committee and then communicated to the membership for review and consultation. After that process is complete, it is brought back to Council for approval and finally made fully available to lawyers through this website.

Complete Criminal Law Standards package (as a PDF) - current to March 6, 2019

#1 - WITHDRAWAL AS COUNSEL

#2 - LAWYERS' COMPETENCE

#3 - DEFENCE OBLIGATIONS REGARDING DISCLOSURE

#4 - WITHDRAWAL OF GUILTY PLEA

CLIA

NSBS

Disclaimer

Privacy

Terms of Use

#1 - WITHDRAWAL AS COUNSEL

CRIMINAL LAW STANDARDS

#1 - Withdrawal as Counsel
#2 - Lawyers' Competence
#3 - Defence Obligations Regarding Disclosure

STANDARD

General

1. A lawyer must not withdraw from representation of a client except with good cause.[1]

2. A lawyer must withdraw from representing a client under the following circumstances: (1) they are discharged by the client; (2) the client persists in instructing the lawyer to act contrary to professional ethics; (3) the lawyer is instructed by the client to do something that is inconsistent with the lawyer's duty to the court; (4) the lawyer's continued representation of the client will lead to a breach of the Rules of Professional Conduct; or (5) the lawyer is not competent to handle the case.[2]

3. A lawyer must provide reasonable notice to the client of his or her intention to withdraw.[3]

Withdrawal for Non-Payment of Fees

4. A lawyer may withdraw because the client has not paid the agreed fee; however, a lawyer must not withdraw from representation of a client on the grounds of non-payment of fees, unless the client is given a reasonable opportunity to obtain another lawyer who will (1) either be able to secure an adjournment of the matter, or (2) be prepared to properly

represent the client on the trial date without adversely affecting his client's interests.[4]

Duties Upon Withdrawal

5. A lawyer must, upon his or her removal as counsel of record, inform the client in writing of the following: (1) that counsel has withdrawn from the case; (2) the reasons for the withdrawal, if any; and (3) if the matter was adjourned, the new date of the trial or hearing; or if the matter was not adjourned, that the client should expect that the trial or hearing will proceed on the currently-scheduled date and that the client should retain new counsel.[5]

6. A lawyer must cooperate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client.[6]

7. Notwithstanding the existence of a lien, the lawyer must ensure that all documents and papers to which the client is entitled, including the Crown disclosure package is promptly delivered to the successor lawyer.

NOTES

1. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-1
2. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-7
3. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-1 and rule 3-7.3
4. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-5
5. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-4
6. NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.7-9

PRACTICE NOTES

Good Cause

"Good cause" will include those situations when the lawyer is usually entitled to withdraw, but must not necessarily do so. For

example, where there has been a loss of confidence between lawyer and client.

The following circumstances may constitute a breakdown in the solicitor-client relationship that may justify a lawyer's withdrawal from a case. The list is non-exhaustive: (1) when the client has deceived the lawyer; (2) when the client has committed dishonorable conduct in the course of the proceedings, e.g. committed perjury, obstruction of justice, intimidation of a justice participant, etc. (3) when the client has adopted a position solely to harass or injure another; (4) the client refuses to accept the lawyer's advice, where this is fundamental to their representation; or (5) the lawyer cannot obtain instructions satisfactory to the lawyer.

The lack of instructions satisfactory to the lawyer may include the absence of instructions. It may also include circumstances when the client has instructed the lawyer to enter a guilty plea so he or she may finalize the criminal process, despite the client maintaining their innocence.
If withdrawal is sought for an ethical reason, then the Court must grant the withdrawal: *R. v. Cunningham*, 2010 SCC 10 at para. 49.

Reasonable Notice to the Client

A lawyer must make reasonable efforts to notify the client in writing whenever possible of their intent to withdraw.[1] Whether the notice the lawyer has given the client is sufficient will depend on the circumstances of each case.

It is admittedly difficult—if not impossible—in some cases to properly notify the client in advance of a lawyer's intention to withdraw as counsel of record. Some clients are transient, with no fixed address. The lawyer must nevertheless do their best to inform the client. A letter sent by the lawyer to their client by registered mail to their last known address will likely meet the standard expected of the rule.

Timely notice may be achieved by the lawyer using other means to communicate with the client. For example, if the lawyer communicates with the client via text messaging, and that means of communication has proven reliable in the past, notice to the client may nevertheless be reasonable under those circumstances.

The underlying obvious reason to give as much notice as possible is to enable the client to have adequate time in which

to retain another lawyer. The lawyer's principal concern must be to protect the client's interests. The lawyer should also endeavor to notify the Crown, and the Court.

A lawyer should make reasonable efforts to ensure that the timing of the application for withdrawal is such that it does not (a) prejudice the client that he or she is placed at a disadvantage at a critical stage in the proceedings; (b) that the client has sufficient time to obtain and instruct new counsel; and (c) court time is not wasted.[2]

When the timing of the application is an issue, the Court is entitled to make enquiries of counsel: *R. v. Cunningham*, 2010 SCC 10 at para. 48.

If the Court enquires as to the reason for the withdrawal, and it is for an "ethical reason," as contemplated by Cunningham (as opposed to non-payment of fees), counsel must give an explanation to the Court that will not (1) violate solicitor-client privilege, and (2) not prejudice the client's interests. Arguably, advising the Court that the reasons for the withdrawal is for "ethical reasons" may prejudice the client's interests, because the Court may draw adverse inferences from the use of that phrase.

The best practice is likely to advise the Court that the reason for withdrawal has "nothing to do with the non-payment of fees," and is related to a reason that makes it necessary for counsel to withdraw, in order to "comply with professional obligations." If the Court insists on a more detailed explanation, counsel should clearly state that it may not be able of doing so without violating privilege.

Be aware of the recent decision of *R. v. Denny*, 2014 NSSC 334 at para. 22. This is a unique decision that seems to go further than the Supreme Court of Canada in Cunningham. In *Denny*, the Court insisted on conducting an in-camera enquiry to hear the circumstances of the breakdown. Regardless of whether the Court decides to hold an in camera hearing (which is highly unlikely), or simply requests the lawyer to specifically put their reasons for withdrawal on the record, the lawyer must be careful to never divulge privileged information or make representation against their client. See also: *Kaizer (Re)*, 2012 ONCA 838 at para. 44.

Although rare, there are cases where trial courts have refused counsel's application to withdraw even in the face of a breakdown in the solicitor client relationship (see *R. v. Johnson*,

[1973] B.C.J. No. 779 (B.C.C.A.)), or denying an accused an adjournment following their counsel withdrawing from the case (see: *R. v. McCormick*, [1993] B.C.J. No. 971 (B.C.C.A.).; *R. v. Smith*, [1989] O.J. No. 1818 (Ont. C.A.).

Withdrawal for Non-Payment of Fees

The Supreme Court of Canada in *R. v. Cunningham*, 2010 SCC 10 confirmed at paragraph 17 of its decision that a court does have the authority to refuse an application made by defence counsel to withdraw as counsel of record for non-payment of legal fees.[3] Justice Rothstein held that the Court's exercise of its discretion to allow counsel's application to withdraw will be guided by the following legal principles:

"47 If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.

48 Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

49 If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see Creasser, at p. 328, and

Deschamps, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be required to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of 00075369-1 5 professional responsibilities.

50 If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (Creasser, at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

> *whether it is feasible for the accused to represent himself or herself;*
> *other means of obtaining representation;*
> *impact on the accused from delay in proceedings, particularly if the accused is in custody;*
> *conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;*
> *impact on the Crown and any co-accused;*
> *impact on complainants, witnesses and jurors;*
> *fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;*
> *the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.*

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused."

Many of the factors set out above in *Cunningham* have to do with timing. In order to avoid the potentially unenviable position of having the court deny counsel permission to withdraw on the basis for no-payment, it may be useful for lawyers to put in place certain practice safeguards.

The lawyer may consider acting for the client on the basis of a

limited retainer. This has the advantage of providing the client with a specific fee-for-service that may provide them with some legal advice, while not compromising their ability to pay. For example, lawyer may agree to act for the client for the purpose of obtaining and reviewing the Crown disclosure package, providing an opinion about the case, or appearing in Court for only one day. It is important that the lawyer advise the Court that they appear for their client for that appearance only, and to make it clear on the record that they may not necessarily be trial counsel.

If the lawyer decides they will act as counsel, they should fix a firm deadline for the payment of fees that will be satisfactory to the lawyer to continue. As the deadline approaches, the lawyer should notify their client that if they may seek to be removed as counsel for non-payment. Once the deadline has expired, the lawyer should immediately notify the client, and the Court of their intention to be removed as counsel and make that application well in advance of the trial.

The lawyer must appreciate that if they leave the matter of non-payment to a date too close to the trial/hearing date, the greater the likelihood the Court will not permit withdrawal.

The suspension or withdrawal of Legal Aid coverage by virtue of s. 19 of the *Legal Aid Act*, will likely constitute just cause to be removed as counsel. Section 19 of the *Legal Aid Act* states:

"Legal aid may be refused, suspended or withdrawn, as the case may be, or a certificate cancelled with regard to any person otherwise eligible when that person, without sufficient reason,
(a) refuses to provide the information or documents required to study his application;
(b) refuses to provide the information required under this Act and by the regulations;
(c) refuses to exercise his legal rights and remedies;
(d) refuses to co-operate with the solicitor rendering professional services for him, in the manner that is normal and customary between a solicitor and his client;
(e) makes a false statement or conceals information in applying for legal aid;
(f) is charged for an offence the same as or similar to one for which he has been convicted previously;
(g) is receiving or has received an unreasonable total amount of legal aid; or
(h) is not ordinarily resident in one of the provinces of Canada. R.S., c. 252, s. 19."

Timing and reasonable notice to the client and the Court will continue to be paramount considerations for the lawyer applying to withdraw as counsel.

Duties Upon Withdrawal

The Courts have long recognized the common law right of a discharged lawyer to exercise a lien on documents in his or her possession; see: *R. v. Gladstone*, [1972] 2 O.R. 127 (Ont. C.A.). But there are exceptions. A Court may interfere in the exercise of the lien where a third party has an interest in the proceedings.[4]

If the lawyer has a right to a retaining lien, he or she should make reasonable efforts to settle the dispute with the client. If the dispute cannot be resolved in a timely manner, but the withholding of the client's file could potentially prejudice the client's interests, the lawyer should not take action to enforce the lien until the completion of the criminal proceedings.

The lawyer's professional duty to transfer the client's file to the successor lawyer should epitomize cooperation and generosity. The lawyer should promptly send the Crown disclosure package to the successor lawyer as soon as practicable after withdrawing from a case.

In the case of non-payment of fees, if the lawyer intends to forward the litigation work product to the successor lawyer, the lawyer should first obtain instructions from the client with respect to the delivery of the remainder of the client's file. Instructions should first be obtained concerning memoranda of law, privately obtained witness statements, legal briefs, and other litigation work product. An attitude that involves generosity and cooperation will go a long way to minimize any potential prejudice to the client.

In many cases, the Crown will not have a running inventory of all of the disclosure that forms part of a file. The lawyer should record those documents and exhibits that are transferred to the successor lawyer, and have a system in place will confirm that the transfer of disclosure materials to the successor lawyer is complete.

The successor lawyer is responsible for ensuring they have complete disclosure. In minor cases, this might be easily accomplished by the successor lawyer speaking with the assigned prosecutor. In more complex cases, it may be necessary for the successor lawyer to attend the Crown

Attorney's office and compare their file with the Crown's disclosure.

Some parts of the disclosure package may be subject to "controlled disclosure" and a corresponding undertaking to the Crown. The lawyer has a duty to ensure those materials are immediately returned to the Crown.

R. v. Dugan, 1994 Carswell Alta 492; 149 A.R. 146 (Alta. C.A.) is an example of the potential difficulty in a former solicitor not ensuring disclosure is passed on to the accused following his withdrawal from the case. The prosecutor had originally made full disclosure to the accused's defence lawyer, but he did not give the disclosure to the accused once he was removed as counsel of record. In addition, the withdrawing lawyer did not inform the Crown or the Court that the disclosure materials had not been passed on. The accused received a copy of his disclosure on the morning of the trial; the Court permitted him until the afternoon to review before commencing with the trial. He was convicted. The Court of Appeal nevertheless upheld the conviction, and said that as a point of practice that if the defence lawyer for some reason is not going to pass on the disclosure to the accused, the lawyer should at a minimum advise the prosecutor and the Court of that fact.

ENDNOTES

1. Note that the Provincial Court Rules 3.1 and 3.2 require that notice be first served on the client and then filed with the Court.
2. The draft Provincial Court practice direction respecting withdrawal of counsel states that the rationale for the requirement to give sufficient notice to the Court is "To prevent last minute withdrawals by counsel for non-payment of fees, or other reasons, such that the Court is unable to re-book, or use the court time for other matters."
3. *R. v. Cunningham*, 2010 SCC 10 at para. 17.
4. *R. v. Gladstone*, [1972] 2 O.R. 127 (Ont. C.A.).

RESOURCES

Sample Clauses for Retainer Agreements: Withdrawal as Counsel

Approved by Council on February 26, 2016

#2 - LAWYERS' COMPETENCE

CRIMINAL LAW STANDARDS

#1 - Withdrawal as Counsel
#2 - Lawyers' Competence
#3 - Defence Obligations Regarding Disclosure

STANDARD

A lawyer must be competent to perform all legal services undertaken on behalf of a client[1]. In the criminal law context, competence requires:

> an objective assessment of whether the lawyer can competently represent the client on the specific matter, having regard to the seriousness of the charge(s) and the complexity of the matter, given the lawyer's experience, pre-existing caseload and available resources[2].
> an ability to recognize potential legal, ethical and evidentiary issues[3].

Commentary

The Rule concerning Competence in section 3.1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012 and the more specific definitions of that term contained within rule 3.1-1 of the Code is a useful starting point to understanding Competence in the context of criminal practice. Experience of counsel is a significant factor in a lawyer's competence to undertake a matter. A lawyer must not undertake a matter without the

requisite skill gained by training and experience. See **rule 3.1-2** of the Code:

Commentary [6] *A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:*

(a) decline to act;
(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

Experience guidelines are a useful starting point to determining whether counsel has sufficient experience.

Counsel can take on cases where they will require some training, as long as the client is advised about the time and expense that may be required[4].

Complexity of the matter includes the form and manner of presentation of the evidence. In some cases this will require the lawyer to have a basic ability to understand specialized information such as financial, scientific (such as DNA), or industry-specific data, and computer literacy and equipment sufficient to allow the lawyer to work with electronic disclosure and evidence presentation. See, specifically, the PPS/police MOU on electronic disclosure.

In *R. v. Therrien*, 2005 BCSC 592, the Court observed:

37 *With those qualifications in mind, I will refer to three cases: Rose, Jonsson, and Hallstone Products. First, in both Rose and Jonsson, the court foreshadowed the eventual response to the claim, as advanced here, of lack of necessary computer skills by counsel. In Rose, Martin J. noted that electronic disclosure is a fact of life, and in relation to acquiring the skills necessary to deal with that development, he said at para. 14 that "it is probably now incumbent ... to get with the program". In Jonsson, the Crown made disclosure of its case on 12 CD-ROMs on which there were summaries of electronic interceptions. The defendant objected on the basis that his lawyer lacked the necessary skills to use a computer and thus could not access the information. As to the lack of computer skills on the part of counsel, Klebuc J. said at para. 14:*

... the day will soon come when the ability to operate a personal

computer and retrieve data stored on computer disks and related media by means of software programs designed for general public use will be a core competency requirement for counsel who wish to act in cases involving voluminous amounts of data.

Competence can involve cultural aspects[5]. Sometimes a client's cultural background can have a substantive effect on their rights to liberty and to a fair trial. For example, Indigenous people are disproportionately denied bail, and still serve longer sentences than non-Indigenous offenders[6]. As a result, when counsel have an Indigenous client they have a positive duty "to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered"[7]. Similar consideration should be given to cultural elements that may affect moral culpability for the purpose of sentencing[8].

Cultural background also has a substantive effect on the right to be tried by a jury of one's peers[9].

Examining competency is a component in determining "ineffective assistance of counsel" in the appeal context, but the standards are not the same. Cases addressing ineffective assistance of counsel arguments in the criminal context can be a useful reference in understanding competence, but the standard for "competence" in the professional discipline context is different than the standard for a successful argument of ineffective assistance of counsel.

R. v. G. D. B., [2000] 1 S.C.R. 520, 2000 SCC 22 – Incompetence as a component of ineffective assistance:

26 *The approach to an ineffectiveness claim is explained in Strickland v. Washington, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.*
27 *Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.*
28 *Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result*

may have been compromised.

29 *In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (Strickland, supra, at p. 697).*

34 *Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice.*

R. v. West, 2010 NSCA 16 – Standard of review for ineffective assistance:

[269] *One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in B.(G.D.), supra, at para. 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.*

Cases addressing ineffective assistance of counsel in the criminal context have commented on specific behavior that may fall below the standard expected of criminal counsel[10]. The impugned conduct will be directed to either particular failings that affect the verdict, or pervasive incompetence that undermine the trial process, or both[11]. Examples include:

(i) Conducting trial while intoxicated – trial fairness [*R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont.C.A.), at para. 78];

(ii) Conducting trial while a true conflict of interest exists – trial fairness [Joanisse, at para. 79];

(iii) Failing to advise client on challenge for cause in jury selection -- trial fairness [Fraser, at paras.57-78];

(iv) Failing to adhere to the rule in Browne v. Dunn – reliability of verdict [*R. v. Gardiner*, 2010 NBCA 46];

(v) Failing to competently conduct a motion to adduce certain evidence – both [Fraser, at paras. 109-114.];

(vi) Failing to advise fully of the benefits/dangers associated with testifying/not testifying, particularly when relying on a defence that has a subjective component –both [Ross, at paras. 37-61.];

(vii) Failing to cross-examine any witness – both [Ross, at paras.58-61];

(viii) Fundamental lack of understanding of the law – trial fairness [Ross, at paras. 58-61];

(ix) Failing to investigate (including a failure to effectively pursue areas at Preliminary Inquiry) and prepare case – reliability of verdict [Fraser, at paras. 94-95];

(x) Failing to prepare witness for testimony – both [Ross, at paras.45, 58-61; Fraser, at paras. 105-107];

(xi) Failing to review new disclosure and advise client of particulars and options – both [Fraser, at paras. 93, 116-119];

(xii) Failing review all evidence of witness, and then failing to call them – reliability of verdict [Fraser, at paras. 84-93, 97-104];

(xiii) The cumulation of failures may affect the verdict [*R. v. J.B.*, 2011 ONCA 404];

(xiv) Failure to advise of possible defences or consequences of a guilty plea – both (though it is unsettled about whether the failure to advise of collateral or administrative consequences constitutes incompetence – *R. v. D.B.*, 2009 CarswellOnt 2028; *R. v. Shiwprashad*, 2015 ONCA 577) [*R. v. S.(C.)*, 2010 ONSC 497]

It is critical for counsel to recognize that competence will not be measured by a microscopic examination, or “forensic autopsy”[12] of counsel’s performance. To do so would discourage the duty of counsel to fearlessly and vigorously defend their clients[13].

Likewise, counsel are entrusted to act independently when they take carriage of a file. They are not the mouthpiece of their client. Their independent judgment includes making strategic decisions, the extent of cross-examination, etc. Advancing any and all objections, making any and all applications that come to mind, regardless of consideration of chances of success, or

effect on other arguments or defences advanced, are the hallmark of incompetence14. See also American Bar Association Criminal Justice Standards for the Defense Function:

Standard 4-5.2: Control and Direction of the Case

(a) *Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.*

(b) *The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:*

(i) whether to proceed without counsel;

(ii) what pleas to enter;

(iii) whether to accept a plea offer;

(iv) whether to cooperate with or provide substantial assistance to the government;

(v) whether to waive jury trial;

(vi) whether to testify in his or her own behalf;

(vii) whether to speak at sentencing;

(viii) whether to appeal; and

(ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) *If defense counsel has a good faith doubt regarding the client's competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.*

(d) *Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to*

conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) *If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.*

Notes

1. This standard is also applicable to limited scope retainers. The challenges of such retainers for providing competent service are many. Please refer to Law Office Management Standard #7: Limited Scope Retainers

2. "The effectiveness of counsel is to be evaluated on an objective standard through the eyes of a reasonable person such that all an accused can expect of his or her defence counsel is a level of competence based on a standard of reasonableness. In other words, the lawyer is 'required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken.' *Central Trust Co. v. Rafuse* [1986], 2 S.C.R. 147 at para. 57." (*R. v. Fraser,* 2011 NSCA 70, at para. 80); also see: *R. v. West*, 2010 NSCA 16 at para 268; *R. v. G.D.B.,* [2000] 1 S.C.R. 520, 2000 SCC 22 at para. 27; Law Society of Upper Canada, "Entry Level Barrister Competencies"

3. *R. v. Ross*, 2012 NSCA 56, at paras. 38-42, 58 (**legal**); *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont.C.A.), at para. 79 (**ethical**); *R. v. Delisle* (1999), 133 C.C.C. (3d) 541 (Que.C.A.), at para. 14 (**ethical**); *Gardiner v. R.*, 2010 NBCA 46, at paras. 8-10, 23, 29 (**evidentiary).**

4. Nova Scotia Barristers' Society, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, rule 3.1-2, commentary [1]-[6].

5. This is not a defined term. In the Society's Equity Portal there is good material – see Cultural competence: An essential skill in an increasingly diverse world – practicePRO

6. *R. v. Gladue* [1999], 1 S.C.R. 688, para. 65; *R. v. Ipeelee*, 2012 SCC 13, para. 61.

7. *Ipeelee*, para. 60.

8. *R. v. X.*, 2013 NSPC 127.

9. *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont.C.A.); leave refused, [1994] 1 S.C.R. x.

10. See *R. v. Furtado*, 2006 CanLII 32992, 43 CR (6^{th}) 305 (ONSC), at para. 74, for a comprehensive review of ineffective assistance of counsel first principles.

11. *Ross*, (see note 3) at para. 33.

12. *Joanisse*, at para. 68.

13. *Ibid.*, at para. 69.

14. *Furtado* (see note 10), at para. 74(19),(25).

References

American Bar Association Criminal Justice Standards

Nova Scotia Provincial Court Rules

Nova Scotia Supreme Court Rules

Nova Scotia Supreme Court Criminal Forms

Nova Scotia Supreme Court Criminal Pre-Trial Conference Form

Nova Scotia Public Prosecution Service – Crown Attorney's Manual

Public Prosecution Service of Canada – Deskbook

Nova Scotia Legal Aid

Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.

#3 - DEFENCE OBLIGATIONS REGARDING DISCLOSURE

STANDARD

Once retained, Defence Counsel must obtain and review adequate Crown disclosure and review it with the client to permit them to obtain instructions from the client and to effectively represent the client.[1]

Commentary

General

[1] The Crown has an obligation to disclose all relevant non-privileged information in its control or possession to the Accused which permits an evaluation of the strength or weaknesses in the Crown's case and to allow an Accused to evaluate whether further investigation is warranted.[2]

[2] Defence Counsel may also refer to the Nova Scotia Public Prosecution Service policy document entitled "Disclosure By The Crown in Criminal Cases". (November 20, 2013)

Retainer[3]

[3] Retainers can be in writing or a retainer may be established through a request for limited or summary representation.[4] The

service requested may be limited or general in scope.[5] The service may be *pro bono* or for an agreed upon fee. In any case, once the solicitor-client relationship has been established, the retainer is complete. [6]

[4] As part of the service provided, Defence Counsel provide their legal opinions.[7] They do so by way of advice to their clients. It is then for the client to provide instructions based upon that advice. It is not unusual for Defence Counsel to differ in their interpretations of disclosure and it is not uncommon for clients to disagree with that interpretation. This should not dissuade Defence Counsel from providing their opinions respectfully and comprehensively.[8]

[5] Where a client's instructions conflict with the Defence Counsel's advice, they must not compromise the client's position even though the conflict will result in the termination of the retainer, and a request to be removed as counsel of record.[9] Defence Counsel should consider how the advice provided and how the instructions may be affected by any equity-seeking community (e.g. Mi'kmaq, African Nova Scotian, Francophone, Immigrant, Persons with Disabilities, LGBTQ, or clients from any other racialized or Indigenous communities) to which they may belong. [10]

Adequate Disclosure

[6] What is adequate disclosure may not always be apparent. Depending upon circumstances and client's instructions, the review might be a cursory review only. Similarly, a client is always at liberty to expressly instruct Defence Counsel to proceed without reviewing full Crown disclosure, although in such cases, wherever possible Defence counsel should strongly consider obtaining those instructions in writing. If a client wishes to enter a guilty plea, Defence Counsel's review obligation might not be as rigorous as when the client wishes advice on possible defences, shortcomings in the Crown's case or possible Charter arguments.[11]

[7] Obtaining Crown disclosure is a process and may often involve multiple requests for further disclosure.[12] It may include refusal by the Crown to provide requested information. It might also include applications to the Court to require the Crown to provide information.[13] Defence Counsel should provide legal advice about the information sought and, if appropriate to do so, obtain instructions to seek the disclosure.[14]

[8] Defence Counsel must try to be alert to inadequate

disclosure and the need to advise a client when and if further disclosure is required to provide effective representation.[15]

Effective Representation Guilty Plea[16]

[9] Even where a client acknowledges guilt and provides instructions to plead guilty to some, all or included offences, Defence Counsel must review adequate disclosure with their client to permit advice that there is admissible evidence of all essential elements of the offence(s) and that no defence is apparent.[17]

[10] Sometimes the client wishes to instruct Defence Counsel that they wish to plead guilty before full disclosure has been made. So long as the client is reasonably well-informed, properly instructs them, confirms those instructions on the record, and the s. 606(1.1) of the Criminal Code inquiry is confirmed by the client on the record [18], Defence Counsel may accept instructions that the client wishes to plead guilty and to represent the client accordingly. Written instructions are strongly recommended in such cases. [19]

Advice of Possible Defences

[11] Where the client is seeking a more in-depth opinion, Defence Counsel should make a detailed investigation of the evidence outlines in the disclosure and, if required request the additional disclosure or a closer review of the evidence outlined in the disclosure. In that case, Defence Counsel must advise of the limitations and constraints of such an inquiry, the time and expense of that inquiry and then to seek instructions accordingly.[20]

[12] Once Defence Counsel believes adequate disclosure has been reviewed, the opinion should be, wherever possible, in writing and any caveats or limitations should be included in that opinion. This is especially true if the client is providing instructions containing waivers, direction concerning procedure or guilty plea.[21]

Duty to the Client

[13] Defence Counsel owes a duty to the client to be honest, ethical and candid. It will not always be possible to give definitive answers to client enquiries with available disclosure or due to the nature of the case. If further disclosure might be of assistance, Defence Counsel must identify that and advise the client accordingly.[22]

[14] It is always open to the client at any time, expressly to waive the requirement for full disclosure or to limit the requirement for full review of further disclosure. In those circumstances Defence Counsel ought to take those instructions in writing and with the confirmation acknowledged by the client that Defence Counsel has advised of the benefits in obtaining further and better disclosure.[23]

[15] Similarly, it is open to the client to expressly waive any inquiry into possible Charter arguments; but Defence Counsel ought to take those instructions in writing and with the confirmation acknowledged by the client that Defence Counsel has advised them of the possible Charter issues.[24]

[16] Within the disclosure requirement is the requirement that Defence Counsel seek instructions from their client so they understand the client's expectations. Defence Counsel should ensure that the client understands how the obtaining full disclosure and reviewing it with the client is integral to the service being provided and any limitations therewith.[25]

Duty to Court

[17] Defence Counsel owes a duty of candour to the Court. It is always proper for Defence Counsel to respectfully advocate their client's instructions. It is never proper to intentionally misrepresent their client's position to the Court. Unless disclosure has been adequately made by the Crown to the Accused, Defence Counsel should seek judicial intervention as forcefully as is possible in the circumstances, whether by way of a *Stinchcombe* application or by other legal means to require the provision of the information necessary to permit an informed election or plea to be made by the client. [26]

Duty to Other Counsel

[18] Defence Counsel owes a duty to colleagues to be respectful. Lawyers often disagree but there is no need to be disagreeable. This is especially true between Crown and Defence Counsel. Crown disclosure may be provided to Defence Counsel with limitations concerning its use or dissemination. Unless those limitations interfere with representation of the client, they should be followed. Otherwise Defence Counsel should not agree to them. Defence Counsel should only agree to limit their ability to provide the disclosure received to their client if it does not interfere with their client's right to make full answer and defence. [27]

[19] Defence Counsel is not restrained from spirited advocacy. This is especially true concerning the need for adequate disclosure. It is the cornerstone of effective representation and it is needed to make full answer and defence.[28]

Duty to the Public

[20] All lawyers have a duty to act honourably and ethically. Defence Counsel should refuse to accept instructions they regard as inappropriate. Disclosure often contains names, addresses and contact information of members of the police and other citizens, including witnesses. Defence Counsel must be on guard that these judicial participants do not become vulnerable to personal attacks or unwarranted interference.[29]

[21] Crown disclosure is confidential information and Defence Counsel must not permit it to be improperly distributed, disseminated or made public.[30] Crown disclosure is made to enable an Accused to make full answer and defence only but remains confidential and also remains the property of the Crown. Defence Counsel receipt of disclosure is always subject to an implied undertaking respecting its use in the absence of an express undertaking.[31]

Third Party Applications

[22] This standard is not meant to apply to Applications for Third Party Records. These records are not usually in the possession of the Crown and are not subject to the general rules governing disclosure.[32]

Defence Disclosure Obligations

[23] This standard is not intended to address the defence disclosure obligations. For a guide to these obligations, the reader should refer to the decision of *R. v. Murray*[33] and the paper of D. Murray Brown.[34]

[24] Clearly, when Defence Counsel come into possession of physical evidence, some consideration should be made to whether Defence Counsel must provide the evidence to Crown.[35] Defence Counsel should refer to Chapter 5.1-2A and the Commentary references [1]-[6] of the Code of Professional Conduct in such instances.

[25] Also, Defence Counsel should keep in mind that certain kinds of information must or should be disclosed to the Crown. If a client instructs Defence Counsel that he has an “alibi”

defence, failure to give notice of this defence will prejudice the accused.[36] In addition, expert evidence is governed by the disclosure obligations under s. 657.3(3) of the Criminal Code. For this reason, clear instructions must be sought from the Accused and those instructions ought to be properly documented.

[26] R. v. Sandeson [2017]NSJ 335 (Arnold J) concerns the situation where information obtained by a private investigator hired by Defence and disclosed by the investigator to Police may be used by the Crown.

Inadvertant Disclosure

[27] In the instance where Defence Counsel receives disclosure determined to be inadvertent, Defence Counsel must not reveal that information to their client, must immediately advise Crown Counsel of the error and deal with the information as requested by Crown Counsel. [37] Examples of inadvertent disclosure are names of Confidential Informants[38] or personal information of vulnerable witnesses.

[28] Receipt by Defence Counsel of inadvertent disclosure is not an automatic disqualification from representing the client and does not amount to a waiver of privilege (e.g Confidential Informant privilege.[39] As well, Defence Counsel should refer to paragraph [21] above.

Notes

*Crown's duty to disclose to the Accused involves different considerations and is dealt with by way of standards internal to PPS (Can) & PPS (NS). See also *R. v. Hennessey* [2013] NJ No 165 (NL Sup Ct)

1. See generally section 3.1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012. See also Criminal law Standard #2: Lawyers' Competence
2. See *R. v. REM* [2011] NSJ No 24 (NSCA); *R. v. Dixon*, [1998] 1 SCR 244
3. See Commentary in Chapter 1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.
4. Ibid

5. See Limited Scope Retainers, rule 3.1-1A in the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.
6. See *NSBS v. Meagher* (2012)
7. Paragraph 30(iv) of decision of Saunders JA in *R. v. Fraser* [2011] NSJ No. 400 (NSCA); contrast this decision with the decision of Saunders JA in *R. v. Hobbs* [1022] NSJ No 335 (NSCA) dismissing a complaint of ineffective representation; See also the decision of Oland JA in *R. v. Dugas* [2012] NSJ No 507 (NSCA)
8. See *R. v. JB* [2011] ONCA 404; *R. v. Ross* [2012] NSJ 283 (NSCA)
9. See Commentary [3] of rule 3.2-2 and section 3.7 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.
10. See general guidance in the decision of Derrick PCJ in *R. v. X* [2014] NSJ No. 609
11. See Criminal Law Standard #4: Withdrawal of Guilty Plea; *R. v. Malik* [2014] OJ No 355 (ONSC). Also see *R. v Symonds*, 2018 NSCA 34 (CanLII)
12. *R. v. Stinchcombe* [1991] SCJ No 83 (SCC)
13. Ibid
14. See *R. v. CS* [2010] ONCJ 497; *R. v. Pena* [1997] BCJ No 1404
15. *R. v . Fraser* [2011] NSJ No. 400 (NSCA (note 7)
16. Supra note 9
17. Supra note 9
18. See Derrick J in *R. v. Buchanan* [2016] NSJ No 283 (NS Prov Ct); *R. v. Moser* [2002] OJ No 552 (SCJ)
19. See Commentary [6] and [8] for rule 3.1-2 and Commentary [3] and [5(f)] of rule 3.2-1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.
20. See rule 3.2-2 and section 3.6 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.
21. Supra note 9
22. See generally section 3.1 and 3.2 of the Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012.

23. Ibid
24. See R. v. Allison [2016] NSJ No 291 (NSSC) especially that the waiver must be “informed”
25. Supra note 9
26. See section 5.1 of the Nova Scotia Barristers' Society, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012.
27. Ibid
28. Ibid
29. rule 5.1-2 of the Nova Scotia Barristers' Society, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012.
30. Ibid
31. See *DP v. Wagg* (2004) 71 OR (3d) 229 (Ont CA); *R. v. Basi*, 2011 BCSC 314; *R. v. Mossaddad*, 2017 ONSC 5520; *R. v. Carter*, 2018 ONSC 1272.
32. See ss. 276-276.4 and ss. 278.1-278.9 of the Criminal Code. These sections govern the limitations upon adducing evidence of prior sexual conduct and the requirements, in order for an accused to access third party records.
33. *R. v. Murray*, 2000 CanLII 22631 (Ont SC)
34. See Recent Developments in Disclosure: A Turn for the Defence, D. Murray Brown QC, December 2000; See also
35. Ibid
36. See *R. v. Young* [1990] NSJ No. 224 (NSCA), MacDonald JA:

    "In the present case and, as I have already mentioned, neither Mr. Young nor Mr. Cullen gave advance notice that alibi evidence was going to be led. Their failure to do so went to the weight to be given such evidence and nothing more."

37. *R. v. Nguyen* [2015] AJ 1157 (ABQB); *R. v. Clarke* [2014] NSJ No. 575 (Coady J); *Derrick v. AG Canada* [2003] NSSC 104 (Goodfellow J); *R. v. Mohammed* [2008] OJ No. 5162. See also *R. v. Way* [2014] NSJ No. 254 (Arnold J) See also *DP v. Wagg*, [2004] 71 OR (3d) 229 (Ont CA) where the issue to be determined involved proposed use of Crown materials in a civil case which followed the Criminal case.

38. Ibid
39. Ibid.

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

#4 - WITHDRAWAL OF GUILTY PLEA

STANDARD

A lawyer who accepts instructions to bring a motion to withdraw a guilty plea must be satisfied following independent investigation[1] that there is a sufficient basis to conclude that the plea was either involuntary, equivocal or uninformed, or that the interests of justice are otherwise such[2] that it would be unjust to maintain the plea[3].

NOTES

Counsel should be fearless in seeking to undo unjust or wrong guilty pleas. They occur. But, with the procedural safeguards afforded to all accused persons, the standard for withdrawing a guilty plea is intentionally high. Reputations of former counsel may be at stake. Your client's reasons for seeking to withdraw the plea will be viewed with skepticism. There are procedural requirements to consider, such as waiver of solicitor-client privilege, filing proper documents in the proper court, and potentially marshalling expert evidence.

Anecdotally, there is no single, uniform practice at present, and the Civil Procedure Rules and Provincial Court Rules provide no guidelines. Some courts and counsel have incorrectly assumed the matter to be pro forma. The required motion, however, carefully balances the proper functioning of the system and maintaining respect for the administration of justice with the overall need to prevent miscarriages of justice. It is, therefore, extremely important to consider the ethical, procedural, legal and practical factors when advising your client on whether to make the motion, advising of chances of success, and litigating.

The importance of your ethical obligations cannot be stressed enough when you are considering a motion to withdraw the guilty plea of a client who was represented by counsel at the time. The admonition in *R. v. Elliott* bears special attention:

"I consider it most unfortunate that any counsel, carried away by his enthusiastic support of his client's cause, should permit himself, by reason of his client's instructions, to make allegations inferring unjust conduct on the part of the Court, or unprofessional conduct on the part of brother solicitors without first satisfying himself by personal investigations or inquiries that some foundation, apart from his client's instructions, existed for making such allegations. His duty to

his client does not absolve a solicitor from heeding his duty to the Court and to his fellow solicitors."[4]

1. The Test

The accused bears the "heavy burden" of demonstrating that the guilty plea should be set aside. It may be misleading or unhelpful to use terms such as "balance of probabilities", or other traditional standards, in assessing the burden on the client here. Some courts have said that there must be "convincing evidence"[5] that the plea was invalid. There will be a strong presumption of a valid plea when it is taken in open court, particularly where the trial judge undertakes the s.606(1.1) Code inquiry[6]. When your client was represented by counsel when the pleas were accepted, withdrawal of the guilty plea will be "almost insurmountable"[7].

The decision to allow that the plea be withdrawn is discretionary, and will only follow where a Court concludes that there is "valid reason" to do so such that it would be unjust to maintain the plea. Therefore, generally, the accused must show that the guilty plea was either involuntary, equivocal and/or uninformed. Exceptional circumstances may also merit setting aside the plea, even where the general test cannot be met[8].

(i) Involuntary

A voluntary plea involves a conscious, volitional choice, for reasons that the accused regards as appropriate at the time. A plea entered in open court will be presumed to be voluntary[9].

Several factors may affect this: undue pressure (external); abusive plea bargaining; being under the influence of alcohol and/or drug at the time of the plea; mental health issues[10]. Rarely will internal pressure or anxiety suffice to invalidate the plea[11].

When alleging alcohol, drugs or mental health issues as invalidating the plea, medical evidence will be required. Either influence must remove the ability to make the volitional choice. In the case of questions regarding cognitive capacity, the test for a valid plea is the same as fitness to stand trial – limited cognitive capacity. There is no need for the accused to have the capacity to make a wise choice[12].

Pressure to plead guilty must be of such a magnitude that it overrode the choice of the accused, and that overridden choice was consistent with assertions of innocence[13].

Pressure to plead guilty from deals made on the Courthouse steps is common and generally insufficient to invalidate the plea[14].

(ii) Equivocal

The accused must plead guilty free from uncertainty, qualification, or confusion. Alcoholic blackout of the facts surrounding the offence will generally not suffice to render the plea equivocal[15]. The plea in open court, especially when represented by (experienced) counsel, with an agreement to the facts and chance to speak to the matter, all favour the conclusion that a plea was unequivocal[16].

Experience of both counsel and the accused will factor into this part of the inquiry[17]. A disagreement with facts other than the essential elements will not render the plea involuntary or equivocal[18].

(iii) Uninformed

An accused must have a sufficient understanding of the nature of the charges, the facts alleged, whether those facts give rise to a valid defence, the effect of the plea, and the consequences of the plea[19]. Consequences can include the effect of the sentence on immigration status[20], or on one's driving suspension under provincial legislation[21].

In circumstances where an accused is unaware of "legally relevant collateral consequences"[22] of conviction and sentence -- one which bears on sufficiently serious legal issues for the accused[23] -- the plea will be uninformed. If such a claim is accepted as credible, an accused must then establish that they would have either: (1) opted for a trial and pleaded not guilty, or (2) pleaded guilty, but with different conditions[24]. A court will assess the veracity of this subjective assertion by looking to objective, contemporaneous evidence[25]. There will be no requirement that the accused demonstrate an arguable defence; nor, a requirement to establish ineffective assistance of counsel – it is the misinformation, and not its source, that drives the prejudice inquiry[26].

Language difficulties arise from time to time. An accused person has to be able to follow the proceedings and understand what s/he is pleading guilty to, as well as the legal consequences. Cases which have resulted in successful motions due to language problems include:

(a) Where it was later discovered that an interpreter provided an incorrect translation of the law of being a party to a crime (by presence at the scene) and the accused would have otherwise pleaded not guilty[27];
(b) Where, even with counsel, the accused did not have a sufficient understanding of English to follow the proceedings. The applicant provided the Court with an independent language proficiency test to substantiate his claim. The Court concluded that the accused's s.14 Charter right to an interpreter was violated and ordered a withdrawal of the guilty plea as a remedy[28].

Be aware, though, that such claims will generally require credibility assessments, and may involve contradictory evidence from counsel who represented the accused at the guilty plea[29].

Again, the experience of counsel and the accused with criminal law will factor into this aspect. The greater counsel's experience, the greater the inference counsel discharged his/her duties thoroughly and professionally; and, that the accused was aware of the charges, facts, effect and consequences of the plea. The accused need not know the exact sentence s/he will receive, or course -- just the risk of various available sentences, due to the nature of the charges and the plea[30].

The fact that an accused feels s/he has a defence, but pleads guilty with full knowledge of this, will not invalidate the plea. The guilty plea relieves the Crown of its burden and removes certain procedural rights of the accused[31].

(iv) The Interests of Justice Otherwise Merit Withdrawal of the Guilty Plea

In rare and exceptional circumstances, the requisites for a valid plea are undisturbed, but the interests of justice require that the plea be set aside. This contemplates situations where the factual innocence can be established, sometimes from new disclosure, often revealed years later. Such instances include:
(a) where unrelated investigations, DNA, etc. lead to the conclusion that another person

committed the offence(s)[32];
(b) where commissioned inquiries lead to the conclusion of systemic, fatal blunders in forensic investigations[33];
(c) where police have falsified or fabricated evidence in the course of their investigations[34]; or,
(d) where the person is factually innocent, but the "false guilty plea" is prompted by "purely pragmatic reasons, such as the offer of a deep discount on penalty, the prospect of release from custody, the inability to pay a lawyer for a trial, or other factors unrelated to guilt.[35]"

2. Preliminary considerations

(i) Waiver of solicitor-client privilege

Before discussing the test to which you should direct your evidence and brief, special discussion of waiver is required. Waiver of solicitor-client privilege is often assumed when these motions proceed. This is not the case, and a number of consequences flow from how this issue is handled.

First, waiver allows you to speak with former counsel. This is part of your ethical duty to the Court and to other counsel to not advance any allegations which may negatively affect counsel's reputation without independent inquiry, apart from the allegations of your client[36].

Second, the waiver allows you to tender the affidavit of former counsel as part of your motion. A refusal to waive solicitor-client privilege does not insulate your client from former counsel's evidence being heard. Crown counsel can seek to have the Court deem waiver so as to equip the Court with a full picture of how the guilty plea came about. Former counsel also have the right to defend his/her reputation[37].

Equally, a refusal to waive solicitor-client privilege, and/or failure to obtain an affidavit from former counsel, give(s) rise to a permissive (and likely inevitable) adverse inference against the accused -- former counsel's evidence would contradict, or at least not support the accused, even if former counsel is called by the Crown[38].

Either way, former counsel have a right to be informed of the pending motion, and must be given sufficient time to prepare an affidavit and contact LIANS. Then a decision may be made on whether to seek to intervene.

There is, therefore, no upside to refusal to waive privilege, and counsel taking on the motion should be very clear with their client about this. Some comfort can be taken from the fact that the Court and counsel have a duty to only pierce privilege to the extent as is necessary to have the issues before the Court fully developed. There is no right to a free roam through former counsel's file, or to stray into irrelevant areas.

(ii) Look at the involvement of counsel

It will be important, based on the preceding point, to look at the involvement of counsel leading up to and including the entry of the guilty plea and sentencing. If counsel acted, and had fulfilled the requirements as set out in the standard for a "Guilty Plea", it will be very difficult to have the plea set aside. There would have to be a critical factor, unknown to counsel at the time, that would materially affect an aspect of the test to warrant bringing the motion.

Take, for example, receipt of late disclosure. The plea may be set aside where there is a reasonable possibility that the information would have influenced the decision to plead guilty had the information been available prior to the plea[39].

(iii) Consult Senior Counsel

This area can be very tricky. It involves a difficult test that may also confront the competence of previous counsel. A lawyer's obligations to the client must be balanced against the lawyer's obligations to the profession and the interests of justice. Since credibility will generally be very much alive, a thorough examination of the circumstances and a healthy measure of sound judgement will be required. It is advised that less experienced counsel consult senior members of the bar for guidance.

3. Jurisdiction

This is a relatively simple aspect. The trial court where the plea was entered is where the motion should be held, unless sentence has already been ordered. If the latter is so, you must appeal to the appropriate appellate court. In the trial court, if the judge who recorded the guilty plea heard the facts in support of the guilty plea, s/he is seized and must hear the motion to withdraw[40]. If the same judge hears the motion to withdraw, this does not relieve the moving party from providing a transcript of the appearance at which the plea was taken, or any other relevant appearances.

4. Procedure

(i) Before Sentencing

The accused bears the burden to satisfy the Court to exercise its discretion in favour of permitting withdrawal of a guilty plea. S/he must, therefore give proper notice to the Court and the Crown. The Civil Procedure Rules govern for Supreme Court (Rule 29). The Provincial Court Rules do not really deal with it. Ultimately, the Crown (and, where applicable, counsel who represented the accused for the plea) will need sufficient notice and time to respond.

Counsel who represented the accused when the plea was taken must consider whether they can represent the accused at the motion to withdraw. This is generally prohibited where:

(i) the reasons for seeking to withdraw the plea require counsel to withdraw, or are such that counsel should seek to withdraw, per the Standard on Withdrawal as Counsel; or,
(ii) the Crown has indicated that it will not consent to the motion.

At a motion to invalidate the guilty plea, counsel's competence and/or reputation will be at least indirectly in the cross-hairs of the inquiry. They will become a witness, whether providing evidence in support of, or contrary to, the accused[41].

Notice documents should include:
(i) Notice of Motion;
(ii) Affidavit of Accused;
(iii) Transcript(s) of relevant proceedings;
(iv) Brief of law;
(v) Where necessary, an affidavit from a medical or other expert;
(vi) A waiver of solicitor-client privilege;

(vii) An affidavit of former counsel who represented the accused when the plea was taken.

The Crown will have the right to cross-examine your client and former counsel, as well as any other affiants.

(ii) After Sentencing

Where the motion to withdraw is brought for the first time on appeal, the Civil Procedure Rules and s. 683 of the Criminal Code apply regarding the need to make a motion to adduce fresh evidence. That is, all of the requirements regarding the of launching criminal appeals apply[42], as well as the requirement to make a motion to adduce fresh evidence.

Where the appellant was represented by counsel at the time the plea was entered, you should obtain a waiver of solicitor-client privilege and follow your ethical obligations to independently satisfy yourself that there is substance to the allegations (below)[43].

The fresh evidence materials must include the Notice of Motion and necessary affidavits from all witnesses upon whom you rely to substantiate the allegations. A modified version of the "Palmer" test[44] must be satisfied for the fresh evidence to be admitted[45]. To add, the evidence must be filed in a manner that is admissible in substance and form, as if it were being tendered at trial. Hearsay, for example, is inadmissible[46].

Practical considerations

Practical factors will include whether the plea was made with full/adequate disclosure; the number of appearances, the time between appearances, comments made by counsel and/or the accused on record, whether counsel have represented the accused before, etc.

Special emphasis should be made regarding the timing of the motion. Once sentence has already been ordered, the Court and procedure may become more stringent for following rules. The required documents will increase in volume, at a greater cost to your client. As a logical consideration, the Court of Appeal will be more skeptical of the effort to set aside the plea, particularly where a fair bit of time has passed between the plea and sentence.

Finally, the judge(s)[47] hearing the motion will not countenance any efforts to manipulate or frustrate the system by bringing the motion. To allow the motion in such circumstances would severely undermine the principle of finality and the repute of the administration of justice[48].

---

1. *R. v. Elliott* (1975), 28 C.C.C. (2d) 546 (Ont. C.A.), at paras. 6-7.
2. The "interests of justice" aspect is not part of the strict test to withdraw a guilty plea. But, rare instances have occurred where newly discovered exculpatory evidence, long after the plea was taken, militate in favour of withdrawing the guilty plea. See, for example, *R. v. Hanemaayer*, 2008 ONCA 580; *R. v. Barton*, 2011 NSCA 12; *R. v. Kumar*, 2011 ONCA 120.
3. *R. v. T.(R.)* (1992), 58 O.A.C. 81, at para. 14; *R. v. Nevin*, 2006 NSCA 72, at para. 20.
4. At para. 7.
5. *R. v. Miller*, 2011 NBCA 52, at paras. 6-8.
6. See, "Guilty Plea" Standard.
7. *R. v. Clermont*, 1996 NSCA 99, at para. 35.

8. See subheading (iv), and footnotes 27 and 28 for examples.
9. *T. (R.)*, at paras. 14, 16.
10. *Ibid*., at para. 17.
11. *Ibid*., at para. 18.
12. *R. v. S.(D.W.)*, 2008 BCCA 453, at paras. 16, 21-22; *R. v. W.(M.A.)*, 2008 ONCA 555, at para. 25.
13. *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.); *R. v. Leo*, [1993] A.J. No. 682 (Prov. Ct.); *Nevin*; *R. v. Beuk*, [2005] O.T.C.319 (S.C.), at para. 70; *R. v. Moser* (2002), 163 C.C.C. (3d) 286 (Ont. S.C.), at para. 33.
14. *Beuk*; *R. v. King*, [2004] O.J. No. 717 (C.A.)
15. *T. (R.)*, at paras. 21-23.
16. *Ibid*.
17. *Nevin*, at para. 20.
18. *R. v. Cheyne* (2006), 208 O.A.C. 42, at paras. 18, 28, 35.
19. *Moser*, at para. 34; *Nevin*, at para. 20.
20. *R. v. Aujla*, 2015 ONCA 325 (Ont. C.A.); *R. v. Shiwprashad*, 2015 ONCA 577.
21. *R. v. Quick*, 2016 ONCA 95.
22. *R. v. Wong*, 2018 SCC 25, at para. 4.
23. *Ibid*.
24. *Ibid*., at para. 6.
25. *Ibid*.
26. *Ibid*., at paras. 23-24.
27. *R. v. Huynh* (1986), 182 C.C.C. (3d) 69 (Alta.C.A.).
28. *R. v. Valencia*, [1998] O.J. No. 3271 (Gen.Div.).
29. See, for example, *R. v. L.(F.)*, 2011 NSPC 8; aff'd, 2011 NSCA 91.
30. *Moser*, at para. 38.
31. *R. v. Peters*, 2014 BCSC 983, at para. 33; *Nevin*, at para. 20; T.(R.), at para. 13.
32. *Hanemaayer* – the accused pleaded guilty to what the police concluded years later was committed by the Scarborough Rapist, Paul Bernardo; *Barton* – the young accused pleaded guilty to sexual assault in order to avoid jail, and years later the victim's recantation and DNA analysis warranted setting aside the guilty plea.
33. *Kumar* -- one of many convictions which were overturned following the Goudge Inquiry into the practices of forensic pathologist, Dr. Charles Smith.
34. *R. v. Andhelm-White*, 2008 NSCA 86.
35. *R. v. McIlvride-Lister*, 2019 ONSC 1869, paras. 3-4.
36. *Elliott*, at paras. 6-7; see, also *R. v. Dunbar*, 2003 BCCA 667, at paras. 335-337.
37. *R. v. Marriott*, 2013 NSCA 12, at paras. 3-2, 15-16, 31-32; *R. v. Thawer*, [1996] O.J. No. 989 (Prov. Ct.), at paras. 17-20; *R. v. Raynor*, 2014 ABQB 449, at paras. 18, 2-28, 33-39.
38. *Ibid*
39. *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70, at paras. 85-90.
40. *Criminal Code*, s.669; *Saskatchewan (Attorney General) v. Saskatchewan (Provincial Court Judge)* (1994) 93 C.C.C. (3d) 483 (Sask.C.A.); *R. v. Savoie* (1994), 145 N.B.R. (2d) 131 (C.A.); *R. v. Moise*, 2011 SKQB 53, at paras. 7-8.
41. *Code of Professional Conduct*, rule 5.2-1
42. See Rule 91 of the *Civil Procedure Rules*.
43. *Elliott*, per note 1, applies here. As well, the NSCA "*Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel*" will likely also apply.
44. *R. v. Palmer*, [1980] 1 S.C.R.759.

45. *Nevin*, at para. 4; *R. v. Pivonka*, 2007 ONCA 572.
46. *R. v. Laffin*, 2009 NSCA 19, at paras. 27-34.
47. A panel of at least three judges will hear the motion as part of the appeal in the Nova Scotia Court of Appeal. A single judge will hear the motion at the trial and Summary Conviction Appeal levels.
48. *Moser*, at para. 42; *Raynor*; *Marriott*.