NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

To: Council

From: Lawrence Rubin

Date: February 7, 2019

Subject: Professional Standards (Criminal) Committee

Standard No. 4: Withdrawal of Guilty Plea

FOR: **APPROVAL** ☐ **INTRODUCTION** ☒ **INFORMATION** ☐

DATE February 15, 2019	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is a new Standard No. 4 – Withdrawal of Guilty Plea being introduced by the Professional Standards (Criminal) Committee. Following introduction to Council, the proposed Standard will be communicated to the Membership for review and consultation. Comments received will be reviewed by the Committee and thereafter the Standard, amended if necessary, will be returned to Council for approval.

Prior to providing this proposed new Standard to you, the Committee referred it to the Racial Equity and Gender Equity Committees for comment. Neither Committee proposed any changes to the proposed Standard.

Executive Summary:

This new standard addresses the circumstances when a party wishes to withdraw a guilty plea, the steps that counsel, acting for that party, must take in those circumstances and the issues counsel should consider.

The draft (attached) is in the usual three-column format, but as a new standard, the first column is blank.

Exhibit: Standard No. 4: Withdrawal of Guilty Plea.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
NEW	**STANDARD: (including commentary and resources)** 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:	This new standard is designed to address the circumstances when a party wishes to withdraw a guilty plea and the steps that counsel, acting for that party, must take and the issues to be considered.

[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.

	"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]	

[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.

	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]	

[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. Lamoreux* (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.

	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:	

[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.

(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 new disclosure, often years later, reveal that the client could/should not have been found guilty. Such instances include:

[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.

(a) where unrelated investigations, DNA, etc. lead to the conclusion that another person committed the offence(s)[32]; or,
(b) where commissioned inquiries lead to the conclusion of systemic, fatal blunders in forensic investigations[33].

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.[34]

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.[35]

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.[36]

[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] *Elliott,* at paras. 6-7; see, also *R. v. Dunbar*, 2003 BCCA 667, at paras. 335-337.
[35] *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.
[36] *Ibid.*

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.[37]

(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

[37] *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, at paras. 85-90.

	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[38]. 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.[39] Notice documents should include: (i) Notice of Motion; (ii) Affidavit of Accused;	

[38] *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.

[39] *Code of Professional Conduct*, Rule 5.2-1

(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[40], 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).[41]

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[42] must be satisfied for the fresh evidence to be admitted.[43] 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.[44]

Practical considerations

[40] See Rule 91 of the *Civil Procedure Rules*.
[41] *Elliott*, per note 1, applies here. As well, the NSCA "*Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel*" will likely also apply.
[42] *R. v. Palmer*, [1980] 1 S.C.R.759.
[43] *Nevin*, at para. 4; *R. v. Pivonka*, 2007 ONCA 572.
[44] *R. v. Laffin*, 2009 NSCA 19, at paras. 27-34.

	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)[45] 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.[46]	

[45] 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.
[46] *Moser*, at para. 42; *Raynor*; *Marriott.*