WITHDRAWAL OF COUNSEL

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must, upon his or her removal as counsel of record, inform the client in writing of the following: (1) that counsel has withdrawn from the case; (2) the reasons for the withdrawal, if any; and (3) if the matter was adjourned, the new date of the trial or hearing; or if the matter was not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.

FOOTNOTES

[1] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7.1

[2] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7.7.

[3] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7.1.

[4] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7.5.

[5] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7.4.

[6] NSBS, *Code of Professional Conduct,* Halifax: Nova Scotia Barristers' Society, 2012, ch 3-7-9.

PRACTICE NOTES

General

"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.

If the solicitor-client relationship has broken down, the Court may insist on conducting an *in-camera* hearing to hear the circumstances of the breakdown, and whether it may be

rehabilitated. See the recent decision of ***R. v. Denny***, 2014 NSSC 334 at para. 22. Courts will be reluctant to put lawyers in a position of having to give evidence, or make representations against their clients, except in rare cases where the proper administration of justice demands it: ***Re Kaizer***, 2012 ONCA 838 at para. 44.

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. 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.

Withdrawal for Non-Payment of Fees

The Supreme Court of Canada in ***Cunningham v. Lilles***, 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 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."*

Duties Upon Withdrawal

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.

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, Rule 3.1-3.2 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. ***Cunningham v. Lilles***, 2010 SCC 10 at para. 17.

4. ***R. v. Gladstone***, [1972] 2 O.R. 127 (Ont. C.A.).