NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin

Date: January 19, 2018

Subject: Professional Standards – Criminal – Standard 2 Lawyers' Competence

DATE January 19, 2018	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is a new Standard No. 2 - Lawyers' Competence being presented for introduction 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 then the Standard, amended if necessary, will be brought back to Council for approval.

Executive Summary:

The Committee's Work Plan included a project related to lawyer competence. The Committee's goal was to articulate the standard with respect to issues of competence for lawyers in the context of criminal proceedings. The Committee notes that the entitlement to effective counsel is now enshrined in Sections 7 and 11(d) of the Charter.

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

Exhibit: Standard 2 Lawyers' Competence with rationale.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
NEW	**LAWYERS' COMPETENCE** **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** **1.** The Rule concerning Competency in Ch. 3.1 of the Nova Scotia Barristers Society Code of Professional Conduct and the more specific definitions of that term contained within Ch. 3.1-1 of the Code are a useful starting point to understanding Competency 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 Code Ch. 3 - Commentary #6:	The entitlement to effective assistance of counsel is now enshrined in ss.7 & 11(d) of the Charter. "Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial…. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same

[1] This standard is also applicable to limited scope retainers. The challenges of such retainers for providing competent service are many. Please refer the Law Office Management Standard #7: http://www.lians.ca/standards/law-office-management-standards/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", http://www.lsuc.on.ca/BarristerCompetencies/;

[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**); *R. v. Gardiner*, 2010 NBCA 46, at paras. 8-10, 23, 29 (**evidentiary).**

	2. 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. **3.** Experience guidelines are a useful starting point to determining whether counsel has sufficient experience. **4.** 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]. **5.** 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. **6.** 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.	skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused." *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont.C.A.), at paras.65-66.

[4] Code of Professional Conduct, Rule 3.1-2, commentary 1-6.

7. Competence can involve cultural aspects. 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 tend to be disproportionately denied bail, and still serve longer sentences than non-indigenous offenders.[5] As a result, when counsel have an indigenous client s/he has 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"[6]. Similar consideration should be given to cultural elements that may affect moral culpability for the purpose of sentencing.[7]

8. Cultural background also has a substantive effect on the right to be tried by a jury of one's peers[8].

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
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> > 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.
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> > 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.
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> > 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.

[5] *R. v. Gladue*, [1999] 1 S.C.R. 688, para. 65 ; *R. v. Ipeelee*, 2012 SCC 13, para. 61.
[6] *Ipeelee*, para. 60.
[7] *R. v. X.*, 2013 NSPC 127.
[8] *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont.C.A.); leave refused, [1994] 1 S.C.R. x.

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.

10. 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.[9] The impugned conduct will be directed to either particular failings that affect the verdict, or pervasive incompetence that undermine the trial process, or both[10]. 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];

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

[10] *Ross*, (see note 2) at para. 33.

(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]

11. It is critical for counsel to recognize that competence will not be measured by a microscopic examination, or "forensic autopsy"[11] of counsel's performance. To do so would discourage the duty of counsel to fearlessly and vigorously defend their clients.[12]

12. 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,

[11] *Joanisse*, at para. 68.

[12] *Ibid.*, at para. 69.

	regardless of consideration of chances of success, or effect on other arguments or defences advanced, are the hall mark of incompetence.[13] **References** Provincial Court Rules http://www.courts.ns.ca/Provincial_Court/NSPC_criminal_rules_forms.htm Supreme Court Rules http://www.courts.ns.ca/Rules/toc.htm Supreme Court Criminal Forms http://www.courts.ns.ca/supreme/sc_forms.htm#criminal Supreme Court Criminal Pre-Trial Conference Form http://www.courts.ns.ca/supreme/documents/nssc_pretrial_conference_report_form_int_09_10.pdf Public Prosecution Service – NS – Crown Attorney's Manual http://www.novascotia.ca/pps/ca_manual.htm Public Prosecution Service – Canada – Deskbook PPSC - Public Prosecution Service of Canada Deskbook Nova Scotia Legal Aid http://www.nslegalaid.ca/lawyers.php NSBS Code of Professional Conduct http://nsbs.org/sites/default/files/cms/menu-pdf/2013-04-22_codeofconduct.pdf	

[13] *Furtado* (see note 3), at para. 74(19),(25).