



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin

Date: March 23, 2018

Subject: Professional Standards (Criminal) Committee

Standard No. 3: Defence Obligations Regarding Disclosure

FOR: **APPROVAL** **INTRODUCTION** **APPROVAL**

DATE March 23, 2018	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is a new Standard No. 3 – Defence Obligations Regarding Disclosure 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 defence obligations regarding disclosure. The Committee's goal was to articulate the standard with respect to issues of disclosure for lawyers in the context of defending criminal proceedings.

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

Exhibit: Standard 3 Defence Obligations Regarding Disclosure with rationale.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
<p>NEW</p>	<p>STANDARD 3: Defence Obligations Regarding Disclosure</p> <p>Once retained, a lawyer must obtain and review adequate Crown disclosure and review it with the client to permit Defence Counsel to obtain instructions from the client and to effectively represent the client.¹</p> <p>COMMENTARY</p> <p>GENERAL</p> <p>[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</p> <p>[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)</p> <p>RETAINER³</p> <p>[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 <i>pro bono</i> or for an agreed upon fee. In any case, once the solicitor-client relationship has been established, the retainer is complete.⁶</p> <p>[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</p> <p>[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</p> <p>ADEQUATE DISCLOSURE</p>	<p>The Professional Standards (Criminal) Committee is of the opinion that a standard is required so that criminal practitioners (i) have a clear understanding of their obligations to obtain and review disclosure; and (ii) uniformly observe minimum requirements respecting this obligation.</p> <p>The Committee considers such a standard to be important to enable criminal practitioners to provide effective services to their clients.</p>

	<p>[6] What is adequate disclosure may not always be apparent. 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</p> <p>[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</p> <p>[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</p> <p>EFFECTIVE REPRESENTATION GUILTY PLEA¹⁶</p> <p>[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</p> <p>[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 record¹⁸, 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</p> <p>ADVICE OF POSSIBLE DEFENCES</p> <p>[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</p> <p>[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</p> <p>DUTY TO THE CLIENT</p>	
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[13] Defence Counsel owe 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.²²

[14] It is always open to the client to waive the requirement for 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 owe 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

	<p>DUTY TO THE PUBLIC</p> <p>[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</p> <p>[21] Crown disclosure is confidential information and Defence Counsel must not permit it to be improperly distributed, disseminated or made public.³⁰</p> <p>O’CONNOR APPLICATIONS</p> <p>[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.³¹</p> <p>DEFENCE DISCLOSURE OBLIGATIONS</p> <p>[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 <i>R. v. Murray</i>³² and the paper of D. Murray Brown.³³</p> <p>[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.³⁴ Defence Counsel should refer to Chapter 5.1-2A and the Commentary references [1]-[6] of the Code of Professional Conduct in such instances.</p> <p>[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.³⁵ 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.</p> <p>[26] <i>R. v. Sandeson</i> [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.</p> <p>INADVERTENT DISCLOSURE</p> <p>[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.³⁶ Examples of inadvertent disclosure are names of Confidential Informants³⁷ or personal information of vulnerable witnesses.</p>	
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[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 privilege³⁷).

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 Chapter 3.1 of Code of Professional Conduct. See also Competence of Counsel Standard (Criminal law Standards)
2. See R. v. REM [2011] NSJ No 24 (NSCA); R. v. Dixon [1998] 1 SCR 244
3. See Commentary in Chapter 1 of Code of Professional Conduct
4. Ibid
5. See Limited Scope Retainers, Chapter 3.1-1A in the Code of Professional Conduct
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. 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 Chapter 3.2-2 and Chapter 3.7 of the Code of Professional Conduct
10. See general guidance in the decision of Derrick PCJ in R. v. X [2014] NSJ No. 609
11. See Criminal Law Standard on “Guilty Pleas” ; R. v. Malik [2014] OJ No 355 (ONSC)
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 Note 7
16. Supra Footnote 9
17. Supra Footnote 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] & [8] Chapter 3.1-2 and Commentary [3] & [5(f)] of Chapter 3.2-1 of the Code of Professional Conduct
20. See Chapter 3.2-2 & 3.6 of the code of professional Conduct
21. Supra Footnote 9
22. See generally Chapter 3.1 and 3.2 Code of Professional Conduct

23. Ibid
24. See R. v. Allison [2016] NSJ No 291 (NSSC) especially that the waiver must be “informed”
25. Supra Footnote 9
26. See Chapter 5.1 of the Code of Professional Conduct
27. Ibid
28. Ibid
29. Chapter 5.1-2 of the Code of Professional Conduct
30. Ibid
31. 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.
32. 2000 CanLII 22631 (Ont SC)
33. See Recent Developments in Disclosure: A Turn for the Defence, D. Murray Brown QC, December 2000; See also
34. Ibid
35. See R. 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. “
36. 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)
37. Ibid