



The Provincial Court of Saskatchewan

PRACTICE DIRECTIVE VI

Withdrawal of Counsel

Chapter 12 of the Canadian Bar Association Code of Professional Conduct states that:

RULE

The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.

A court has the authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees, but the authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice.

Rationale

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. By adopting this policy, counsel will be in a position to advance the date of payment of fees with their clients, and/or to assist the Court in reducing the number of criminal trials that must be adjourned and to permit the cancellation of witnesses in a timely manner.

Commentaries (CBA Code, supplemented by references to *R v Cunningham*)

Guiding Principles

Although the client has a right to terminate the lawyer client relationship at will, the lawyer does not enjoy the same freedom of action. Having once accepted professional employment the lawyer should complete the task as ably as possible unless there is a justifiable cause for terminating the relationship.

The lawyer who withdraws from employment should act so as to minimize expense and avoid prejudice to the client, doing everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer.

Where withdrawal is required or permitted by this Rule the lawyer must comply with all applicable Rules of Court as well as local rules and practice.

In *R v Cunningham*, [2010] 1 SCR 331, the Supreme Court of Canada stated that the court's exercise of discretion to allow counsel's application for withdrawal shall be guided by the following principles:

- (a) If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the Court shall allow the withdrawal.
- (b) If timing is an issue, the Court is entitled to inquire into counsel's reasons. 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. If withdrawal is sought for an ethical reason, the Court must grant the withdrawal; if it is sought because of non-payment of legal fees, the Court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.

[paragraph 47 – 50]

Obligatory Withdrawal

In some circumstances the lawyer will be under a duty to withdraw. The obvious example is following discharge by the client. Other examples are:

- a) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the Court or tribunal and, following explanation, the client persists in such instructions;
- b) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;
- c) if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules such as, for example, a breach of the Rule relating to conflict of interest; or
- d) if it develops that the lawyer is not competent to handle the matter.

In all of these situations there is a duty to inform the client that the lawyer must withdraw.

Optional Withdrawal

Situations where a lawyer would be entitled to withdraw, although not under a positive duty to do so, will generally arise only where there has been a serious loss of confidence between lawyer and client. Such a loss of confidence goes to the very basis of the relationship. Thus, the lawyer who is deceived by the client will have justifiable cause for withdrawal. Again, the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate such a loss of confidence. At the same time, the lawyer should not use the threat of withdrawal as a device to force the client into making a hasty decision on a difficult question. The lawyer may withdraw if unable to obtain instructions from the client.

Non-Payment of Fees

Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result.

In determining whether withdrawal should be permitted because of non-payment of fees, 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 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 proceeding and the history of proceedings, e.g. if the accused has changed lawyers repeatedly. [*R v. Cunningham*, paragraph 50]

Notice to Client

No hard and fast rules can be laid down as to what will constitute reasonable notice prior to withdrawal. Where the matter is covered by statutory provisions or Rules of Court, these will govern. In other situations the governing principle is that the lawyer should protect the client's interests so far as possible and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Practice Directive

1. Counsel who appear with or on behalf of a party to a proceeding or file a designation of counsel with the Court, will thereafter continue as counsel of record for that party unless that counsel is removed by Order of the Court or is granted leave to withdraw in accordance with this Practice Directive.
2. This Practice Directive does not apply to counsel appearing as either counsel for the Crown or legal Aid duty counsel, and who have identified themselves as such to the Court.
3. This Practice Directive applies to applications made by counsel of record for an accused who is seeking to withdraw as counsel of record and to applications to remove counsel of record.
4. Hearings to consider an application to withdraw as counsel of record, on the basis of non-payment of fees, will be required where the request of counsel to withdraw is made within the period that is less than **45 days** prior to the scheduled trial or preliminary hearing date if scheduled for one day or less. If scheduled for more than one day, a hearing will be required if the request to withdraw is made less than **90 days** prior to the scheduled trial or preliminary hearing date. In either case a determination will be made at the discretion of the Court. Notice of an application must be sent by counsel of record to his or her client by ordinary mail to the last known address of the client maintained by counsel of record.
5. Any application made by counsel of record to withdraw for any ethical reason shall be granted by the Court, in open Court, where the request is confirmed, in advance, to the Court in writing. Notice of an application must be sent by counsel of record to his or her client by ordinary mail to the last known address of the client maintained by counsel of record.
6. Any application made by counsel of record to withdraw for any financial reason may be granted by the Court, in Court, where the request is confirmed, in advance to the Court, in writing:
 - (a) for a trial or preliminary hearing scheduled for one day or less, more than 45 days prior to the scheduled trial or preliminary hearing date; and
 - (b) for a trial or preliminary hearing scheduled for more than one day, more than 90 days prior to the start of the scheduled trial or preliminary hearing;unless the principles enunciated above in *Cunningham* make it inappropriate.
7. Counsel applying to withdraw as counsel of record shall inform Crown counsel of the application, in writing, concurrent with notification to the Court of the application.