Opinion of the Ethics Committee

December 2018

Withdrawal of Legal Aid and Duty Counsel Services

Past Ethics Opinions have been issued on the withdrawal of legal aid services issue or closely related issues in 1991, 1994, twice in 1998, and 2002. However, those opinions pre-date the leading Supreme Court of Canada decision in *R v. Cunningham* [2010] 1 SCR 331, which considered the withdrawal of services by a lawyer who was counsel of record for a trial that had been set. For reasons that include the guidance given by the Court in *Cunningham*, this opinion differs in some important respects from those previous opinions.

Salient points from past Ethics (or precursor) Committee Opinions:

1. The 1991 Opinion acknowledges that lawyers do not have an obligation to accept 'new' work from the Legal Services Society merely because they have previously accepted work or because it is sent or 'assigned' to them. None of the subsequent ethics opinions have diverged from the 1991 Opinion on this point.

2. Accordingly, the recognition of a significant ethical obligation in connection with the withdrawal of services has been limited to files or duty counsel engagements that a lawyer has specifically agreed to accept. In past, the relevant circumstances have been characterized as a situation in which a lawyer proposes to withdraw services from a current client (or roster of clients). The 1991 Opinion refers to such circumstances as "withdrawing from cases in progress."

3. On withdrawing from cases in progress, the 1991 Opinion recognizes both a potential breach of contract issue and an issue of potential unfairness to the client and concludes that a lawyer may withdraw services in such cases only if there is provision in the retainer for the lawyer to do so or after obtaining the informed consent of the client. In either event, in regard to a potential withdrawal of services, the 1991 Opinion recognized the lawyer's obligation to be attentive to any potential unfairness to the client, including recognizing the client's unequal bargaining position, and to ensure that client consent is freely given, upon the client's clear understanding of the consequences of the withdrawal and of the lawyer's obligations. The 1991 Opinion noted that "there may be some circumstances in which no amount of notice will suffice to avoid unfairness to a client." The essence of the 1991 Opinion is that if a lawyer's withdrawal of legal aid services would amount to unfairness to the client, then the lawyer should not withdraw services.

4. The 1991 Opinion also turned its focus to lawyers' counselling or attempting to persuade other lawyers to withdraw services. The Committee concluded that such counselling would not be unethical, "… so long as the withdrawal of services to which the persuasion is directed is neither unethical nor a breach of contract … and so long as the method of persuasion is not itself unprofessional."

5. The 1994 Opinion expressed general agreement with the 1991 Opinion and added some more specific considerations and made reference to relevant provisions from the *Professional Conduct Handbook*.

6. The 1994 Opinion considered the circumstance of lawyers who had committed to act as duty counsel on specific occasions and the Opinion viewed this as analogous to lawyers who had committed to act as counsel in a trial or hearing. The fact that duty counsel would have agreed to act on behalf of individuals who could not be identified in advance was seen as not affecting the professional obligations the duty counsel lawyer owed to those clients. The 1994 Opinion identified that the primary requirement for an acceptable withdrawal was ensuring that the clients were treated fairly and contended that, in the circumstances, that duty of fairness can only be executed by the actual presence of duty counsel, to assist individuals who need and are entitled to duty counsel services. The 1994 Opinion observed that it is the responsibility of any duty counsel, before his or her services may be withdrawn, to ensure that there is another duty counsel available to assist those individuals.

7. The 1994 Opinion went on to consider the withdrawal of services in relation to a lawyer's various professional obligations referred to in the Canons of Legal Ethics. The 1994 Opinion observed that, in addition to a lawyer's obligations to be fair to the client and not to withdraw for an improper purpose, there is a responsibility to the courts, tribunals, and others involved in the justice process, to ensure that sufficient notice of withdrawal is given so that inconvenience and waste of time and resources is minimized. Accordingly, the 1994 Opinion concluded that there could be circumstances in which, although obligations to the client may have been met, it would still be unethical to withdraw.

8. The 1998(I) Opinion simply reaffirmed the 1994 Opinion in the specific respect of the responsibility of duty counsel, before withdrawing his or her services, to ensure that another duty counsel is available to provide services to those who would need them.

9. The 1998(II) Opinion responded to three specific questions posed by a representative of the BC Branch of the Canadian Bar Association.

    a. In response to the question of how much notice a lawyer withdrawing from duty counsel services must provide, the Opinion reiterated the view that the important aspect is ensuring that another duty counsel would be available, not the length of

notice that is given. If no other duty counsel would be available to assist those who would rely on duty counsel, then any amount of notice of withdrawal would be insufficient.

b. Regarding prioritizing of assignments by a staff lawyer who might be asked to stand in as duty counsel, the 1998(II) Opinion observed that a staff lawyer may accept such an assignment provided he or she has the relevant competence and capacity (including time and availability). The Opinion further observed that capacity to do so might be gained by having existing work assigned to another staff person or by withdrawing from other representation duties where it would be ethically permissible to do so.

c. In response to a query about a staff lawyer who may be inexperienced in criminal law being asked to stand as duty counsel, the Opinion responded that a lawyer who is to perform the duty counsel role should be competent to do so.

10. The final past opinion, the 2002 Opinion, was issued in response to two questions from the Legal Services Society.

d. In responding to "whether in the context of an LSS decision to decline to pay their accounts, lawyers may withdraw from a duty counsel commitment short of providing a replacement (who would presumably have to act without fee)," the Opinion indicated that, where a funding reduction would prevent the Society from paying lawyers who had agreed to serve as duty counsel, lawyers may withdraw by giving reasonable notice to the court of their intention to do so. It was further observed that reasonable notice will depend on the circumstances but that it may be as little as one day, given the brief preparation time required by lawyers to perform duty counsel work.

e. In responding to a query as to whether the obligation of duty counsel to an accused in custody is different than to an accused not in custody, the Opinion indicated that, with respect to the notice requirement, no distinction need be made between those accused who are in custody and those accused who are not.

Summary and Opinion Update

11. The opinion of the present Ethics Committee is that, though the past opinions are correct in many respects, they are not perfectly consistent with each other and they do not provide the best analysis of the specific issue of duty counsel's potential withdrawal from an accepted assignment. On the whole the Ethics Committee agrees that where there is an existing client relationship, fairness to the client will generally be the most important consideration in relation to the permissibility of withdrawal of services. The Ethics

Committee also agrees that a lawyer's duties as described in the Canons of Legal Ethics are important considerations in determining whether a lawyer may withdraw legal aid services. Thus, where the provision of services has progressed to the point that communication with the Court is feasible, for example, where a lawyer is counsel of record, it may be important to provide the Court with notice of the intention to withdraw and to ensure that the withdrawal of services causes no more disruption to the Court's processes than is necessary within the context of the withdrawal.

12. In respect of the potential withdrawal from an accepted duty counsel assignment, the Ethics Committee recognizes a significant difference between the period in which the actual provision of services occurs, during which considerations of fairness to the client are paramount, and the prior period, beginning with the acceptance of the duty counsel assignment and continuing until just before the provision of services begins. The Committee's understanding is that bookings for duty counsel assignments may be made as much as six months before the date on which services are to be provided. At the time such arrangements are accepted, there is no foreseeability of who will need duty counsel services on the assigned date, nor of what legal services an individual might require, and it may be that the circumstances giving rise to an individual's need for legal services would not yet have occurred. The Ethics Committee is not convinced that the mere fact that there would eventually be a solicitor client relationship created, between whichever lawyer provides duty counsel services and whichever individuals receive the services, is determinative of whether a lawyer may withdraw from a duty counsel assignment.

13. The Committee agrees with the 2002 Opinion that if lawyers who agree to duty counsel assignments subsequently learn that they will not be paid for providing services, it is permissible for them to withdraw prior to the creation of actual solicitor-client relationships. However, the Committee recognizes that this view is inconsistent with the stipulation that fairness to the client will generally make it improper to withdraw duty counsel services unless one can ensure that another duty counsel will make services available to the client. Consequently, the Committee does not agree that lawyers seeking to withdraw from a duty counsel assignment during the period before any services are provided would be responsible for ensuring that a replacement duty counsel is available.

14. In coming to its view on withdrawing from a duty counsel assignment the Committee has focused on ethical obligations and not contractual obligations. Attending to the implications in contract of a withdrawal from a duty counsel assignment may also be important for lawyers considering such withdrawal. In considering lawyers' ethical obligations, the Committee has found it problematic that the only circumstance from which a lawyer might be given no hope of withdrawal would be the one in which no solicitor-client relationship has yet been formed. In the context of a general withdrawal of services as part of a 'job action,' the reality is that a requirement for duty counsel to

find their own replacements would make withdrawal impossible and might preclude participation in a particular 'job action,' which action might be motivated in part by the prospect of improvement in the administration of justice. The Committee was also troubled that, under previous opinions, a lawyer's ability to withdraw ethically might hinge on an essentially arbitrary scheduling choice to make duty counsel bookings some number of months in advance of the service dates. While the existing practice for scheduling duty counsel may work well in many circumstances for both the administrative needs of the Legal Services Society and the planning convenience of those lawyers who provide duty counsel services, ascribing so much ethical significance to the assignment acceptance date would create a situation where lawyers' ethical responsibilities could be arbitrarily extended by changing the booking practices of the administrative authority.

15. The Committee has also come to its opinion in view of some specific aspects of the Supreme Court's decision in *R v. Cunningham* [2010] 1 SCR 331. *Cunningham* concerned a lawyer's request to withdraw, in a non-payment of fees situation, once a matter was before the Court; it was not about a lawyer seeking to withdraw from a duty counsel assignment. The Court also identified and distinguished the Court's role to protect the administration of justice and ensure trial fairness from a law society's role to offer guidance on when withdrawal may be sought and to maintain professional standards through disciplinary processes. However, the *Cunningham* matter provided the Court with an opportunity to consider a number of principles the Committee views as similarly important to a consideration of the duty counsel situation. The Court commented that a refusal to allow a withdrawal in a non-payment of fees situation "…should truly be a remedy of last resort and should only be relied on where it is necessary to prevent serious harm to the administration of justice."[Para. 45] In reaching this conclusion the Court observed that: "In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers." In a similar manner, the Committee views the prospect of whether a lawyer's withdrawal of services would be apt to cause a substantial harm to the administration of justice as the consideration of central importance for the lawyer contemplating withdrawal. And at the same time, the Committee observes that the existing circumstances in the area of government funded legal aid services are not the creation of the lawyers who provide those services. An analysis of responsibility for the consequences of any contemplated withdrawal is not as simple as declaring that all consequences flow from the withdrawal alone, as the existing circumstances and any action or failure to react with mitigating effect on the part of the government or the Legal Services Society, particularly upon receiving significant notice, might also be identified as the cause of any resulting disruption.

16. With respect to the existing guiding provisions, the Committee observes that the Canons of Legal Ethics and the Duty of Integrity have survived substantially intact from the

Professional Conduct Handbook and are present in the BC Code at Chapter 2. They remain important provisions. Where it may be correctly applied, BC Code section 3.7, with rules, sub-rules and Commentary, provides guidance on withdrawal from representation. Accordingly, the present opinion of the Ethics Committee is that lawyers considering withdrawing their legal aid services or duty counsel services should have reference to all of these provisions and be guided by them wherever they have specific application.

17. With respect to the situation of duty counsel considering withdrawal of services in the period before the date of service, the Committee's opinion is that the most important consideration, in view of the Canons and the *Cunningham* decision, is whether the lawyer's withdrawal will result in a substantial harm to the administration of justice. As such, the permissibility of a lawyer's withdrawal will depend on an assessment of relevant circumstances. The extent of any period of notice provided would be one such relevant circumstance. In addition to notice considerations, other potentially relevant circumstances may include the details of the specific duty counsel assignment, for example, whether it is likely to include assisting individuals who are detained in custody, as well as differences of region, such as how frequently the relevant court has sittings, how the geographical location may influence the potential for mitigating replacement arrangements, and, also identified in *Cunningham*, the potential significance of "local rules and practices" on the effects of the contemplated withdrawal. This list of potentially relevant circumstances is not, and is not intended to be, exhaustive or exclusive. Lawyers contemplating withdrawing from a duty counsel assignment should take reasonable steps to attend to a consideration of any potentially relevant circumstances within their understanding.

18. There is of course no generally applicable answer to the question of how much notice is enough. But it is clear that as far as an assessment of ethical responsibility is concerned, a lawyer who withdraws without notice or on very short notice is at much greater risk of being judged responsible for any resulting harmful consequences than a lawyer who withdraws from a duty counsel assignment with notice several months in advance of the service date. The Committee recognizes that the actions of the withdrawing lawyer are not the only ones that may have a determining effect on consequences of the withdrawal. However, a lawyer whose withdrawal creates a situation in which there is not sufficient time or opportunity for mitigating action by others is at much greater risk of being judged responsible for any resulting harmful consequences than one whose withdrawal is more remote from any specific consequences in relation to the administration of justice. Accordingly, any unnecessary delay in the provision of notice of the intention to withdraw may be significant to an assessment of ethical responsibility.

19. The Committee is aware that this opinion would require a lawyer to consider relevant facts and ethical duties and that coming to a decision on a potential withdrawal of services in particular circumstances may require the exercise of careful judgment.[1] However, the situation where lawyers may withdraw services, in a context of collaborating to ensure that no services will be available, for purposes that may include both a desired improvement in an aspect of the administration of justice and improved conditions for the lawyers themselves, is ethically complicated because of potentially competing interests and concerns. The Committee's advice to individual lawyers who may be considering withdrawal from an accepted duty counsel assignment would be that they should be cautious and conscientious, in considering their professional duties and any relevant circumstances of the particular duty counsel assignment, while addressing this difficult ethical terrain.

[End of Opinion]

[1] The correct or best answer to ethical questions that arise in practice may often be difficult to discern. Lawyers should always be aware that discussion of such questions with Benchers, Law Society practice advisors, or other experienced and trusted colleagues is the approach most likely to identify a reasonable course of action consistent with lawyers' ethical obligations, including whether or not to withdraw services.