

CRIMINAL PRACTICE DIRECTIVE NO. 9
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Effective: ***** **, 2020

The right to effective assistance of counsel extends to all accused persons. In criminal appeals, the appellant may raise grounds of appeal suggesting that trial counsel was ineffective, incompetent or otherwise contributed to a miscarriage of justice. In order for an appeal alleging ineffective or incompetent trial counsel to succeed, it must be established:

- (a) that trial counsel's acts or omissions constituted incompetence, and
- (b) that a miscarriage of justice resulted.

Incompetence is determined by a reasonableness standard. There is 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 were not the result of reasonable professional judgment: R v GDB. 2000 SCC 22

Application of Practice Directive

This directive applies to those criminal appeals before the Court of Appeal for Saskatchewan in which the appellant advances as a basis of the appeal that trial counsel provided ineffective assistance at trial resulting in a miscarriage of justice.

Review of Notices of Appeal by Registrar and Crown

The registrar of the Court will review all notices of appeal filed in criminal appeals to determine if the appellant is advancing ineffective assistance of trial counsel as a basis for the appeal and will categorize each such notice of appeal using the categories described below.

Crown counsel who becomes aware that an appellant is raising such issues must notify the registrar.

Appeal Categories and Initial Process for Each

Category A: Appeals by Represented Appellants

1. Before appeal counsel decides whether to advance an allegation of ineffective assistance of trial counsel as a ground of appeal, appeal counsel should:

- (a) satisfy her or himself, by personal investigation or other appropriate inquiries, that some factual foundation exists for this allegation to be made apart from the instructions of the appellant;
- (b) provide trial counsel with informal notice of the general nature of the potential allegation of ineffective assistance;

(c) provide trial counsel with a reasonable opportunity to respond to appeal counsel regarding the allegations; and

(d) consider trial counsel's response, if any, before proceeding with this ground of appeal.

2. Where a notice of appeal or amended notice of appeal prepared and filed by counsel for an appellant contains an allegation of ineffective assistance of trial counsel, the registrar will take the following steps:

(a) formally notify trial counsel of the allegation;

(b) schedule the appeal for appeal management; and

(c) provide trial counsel with a copy of this practice directive.

Category B: Appeals by Self-represented Appellants

1. Where a notice of appeal prepared and filed by a self-represented appellant who entered a **guilty plea** at trial contains an allegation of ineffective assistance of trial counsel, the registrar will either schedule the appeal as a **sentence appeal** in the ordinary course or may, in her or his discretion, direct the appeal to appeal management.

2. If the registrar schedules the appeal as a sentence appeal, the panel of the Court hearing the appeal may consider and decide the appeal or may direct the appeal to appeal management.

3. Where a notice of appeal prepared and filed by a self-represented appellant who entered a **not guilty plea** at trial contains an allegation of ineffective assistance of trial counsel, the registrar may direct the appeal to appeal management or may schedule the appeal for hearing in the ordinary course.

4. If the appeal is directed to appeal management, the registrar will:

(a) set a date for appeal management;

(b) notify trial counsel of the allegation; and

(c) provide both the appellant and trial counsel with a copy of this practice directive.

Initial Considerations for Trial Counsel

When trial counsel receives notification of an allegation of ineffective assistance of trial counsel, either from appeal counsel or from the registrar, trial counsel should locate and maintain her or his file relating to the criminal prosecution. Trial counsel is encouraged to contact the Saskatchewan Lawyers' Insurance Association (SLIA) with regard to file management and transfer.

If the allegation proceeds to an appeal hearing, trial counsel should be aware that the Court may order the disclosure of trial counsel's file to some or all parties to the appeal and that the file may be made available to the Court.

Appeal Management Process

Appeal Management Judge

Appeal management proceedings are scheduled before a judge of the Court in chambers pursuant to Rule 32 of *The Court of Appeal Criminal Appeal Rules (Saskatchewan)*. Once a judge of the Court has commenced appeal management on an appeal, that judge may continue with appeal management for as long as she or he considers it necessary and advisable to do so.

Waiver of Solicitor/Client Privilege

In some cases the trial record may suffice as an evidential basis for an allegation of ineffective counsel leading to a miscarriage of justice. In other cases, the allegations may pertain to matters that occurred between the appellant and counsel that are not reflected in the record. In these latter cases, fresh evidence on appeal may be necessary to enable proper consideration of the issue.

Where the contents of trial counsel's file is considered relevant to the appeal, a waiver of solicitor-client privilege will need to be provided to trial counsel by the appellant. The appeal management judge will canvass the issue of waiver and may set timelines for dealing with this issue.

Transfer of Trial Counsel's File

In cases where a waiver has been provided, trial counsel should, in the normal course, release her or his original file to counsel for the appellant or to the appellant, her or himself, if the appellant is self-represented. Trial counsel may, at her or his own expense, retain a copy of the entire file or portions of the file if she or he wishes or is professionally obligated to do so.

If trial counsel has any objection to the transfer of his or her file, or parts of it, she or he may bring those objections to the attention of the appeal management judge forthwith. The appeal management judge may refer the issue to a panel of the Court for a determination.

The appeal management judge may set a timeline for the provision of trial counsel's file. If these timelines are not met, the appellant may make an application to the Court for production of the file.

The appeal management judge may give any further directions she or he considers appropriate, including setting the appeal for hearing.

Application for Fresh Evidence

When the appellant is relying on more than the record as the evidentiary basis for an allegation of the ineffective assistance of counsel, the appellant must file an application to adduce fresh evidence, supported by an affidavit. The application for fresh evidence will be heard by the Court at the same time as the appeal is heard unless the Court directs otherwise. The appeal management judge will set timelines for the service and filing of the application and affidavit. If the timeline is not met, the appeal management judge may make any further order considered appropriate, or may refer the appeal to the Court to make any order that the Court considers just.

Affidavit from Trial Counsel

If trial counsel considers it appropriate to do so, she or he may file an affidavit in response to the fresh evidence application. If trial counsel intends to file an affidavit, the

appeal management judge will set a timeline for the service and filing of the affidavit. If this timeline is not met, the appeal management judge may set further timelines or make any further order she or he thinks appropriate, or may set the appeal for hearing by the Court.

Cross-Examination on Affidavit

Any party desiring to cross-examine an affiant must notify the appeal management judge, with notice to all other appeal management participants and trial counsel. The panel of the Court hearing the appeal shall determine whether cross-examination will be permitted.

PROPOSED DRAFT