



COURT OF APPEAL

**British Columbia Court of Appeal**  
**Practice Directive (Criminal)**  
**Title: Ineffective Assistance of Trial Counsel**

**Issued: 12 November 2013**

**Effective: Immediately**

**Cite as: *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013)**

*If a party is not represented and makes allegations of ineffective assistance of trial counsel, the appeal will be immediately referred to case management for directions.*

Stage One: Counsel's Duties Where there are allegations that trial counsel was ineffective or incompetent

1. Before advancing an appeal involving grounds of appeal which allege ineffective assistance or incompetence of trial counsel, counsel for the appellant must:
  - a. Take steps necessary to satisfy him or herself that there is some foundation for any allegations that trial counsel was ineffective or incompetent; and
  - b. Informally notify trial counsel of the nature of the allegations bearing on the professional conduct of trial counsel, and give trial counsel a reasonable opportunity to informally respond to the allegations to counsel for the appellant.

Stage Two: Advancing an Appeal Alleging that trial counsel was ineffective

2. Where a Notice of Appeal or amended Notice of Appeal includes grounds of appeal alleging the ineffective assistance of trial counsel:
  - a. The Chief Justice will designate a justice of the Court as a case management judge to make directions with respect to the appeal.
  - b. The registrar will, within four weeks of the filing of the Notice of Appeal, schedule a case management hearing to be presided over by the case management judge
3. Where the Notice of Appeal includes grounds of appeal or is amended to include grounds of appeal that trial counsel was ineffective or incompetent, counsel for the appellant shall formally serve a copy of that Notice of Appeal on trial counsel.

4. The appellant shall prepare and provide to trial counsel his or her affidavit setting out the factual basis for the allegations bearing on trial counsel's professional conduct and a signed waiver in which the appellant expressly waives solicitor-client privilege to the extent necessary to allow trial counsel to respond to the allegations against him or her. The appellant shall also deliver a copy of the affidavit and signed waiver to the Crown/respondent.
5. Upon written request by counsel for the appellant, trial counsel shall forward his or her entire trial file to counsel for the appellant, in accordance with the professional obligations of counsel.
6. If trial counsel wants to keep a copy of all, or any portion, of the trial file before transferring the file to counsel for the appellant, trial counsel may (at his or her own expense) make copies of whatever documents he or she wishes from the file. In addition, if trial counsel wants access to the file in connection with the appellant's case after it has been transferred to counsel for the appellant, counsel for the appellant must facilitate this access to the entirety of that file in a timely way, and must permit trial counsel to make copies (at his or her own expense) of whatever documents he or she wishes from the file.
7. Upon receipt of a copy of a Notice of Appeal, the Crown/respondent will forward a letter in Form A to trial counsel requesting an affidavit in response to the allegations set out in the appellant's material.
8. Upon receipt of the material referred to above, namely (a) a copy of a Notice of Appeal, (b) a signed waiver of privilege, (c) any affidavits or other material setting out the factual basis for the allegations bearing on trial counsel's professional conduct, and (d) the request from Crown/respondent, trial counsel shall prepare an affidavit in response to the allegations. Trial counsel's affidavit shall not divulge any confidential information learned or obtained by trial counsel during the course of the file or instructions given by the appellant, except to the extent necessary to fully respond to the allegations of ineffective assistance. Trial counsel's original affidavit and a copy shall be provided to counsel for the appellant.
9. Upon receipt of trial counsel's affidavit, counsel for the appellant shall review it and where he or she is of the opinion that it divulges confidential information or instructions of the appellant exceeding what is necessary for trial counsel to respond to the allegations, edit the copy of the affidavit and redact any portions of the affidavit over which privilege is asserted. A redacted copy of the affidavits shall be sent to the Crown/respondent (with redactions showing as blackened lines) and trial counsel, unless otherwise directed by the case management judge

10. Counsel for the appellant shall file with the Court, (a) the original copy of trial counsel's affidavit and (b) any edited or redacted version of the affidavit, both which shall be sealed by the registrar pending directions from the case management judge.

### Stage Three: Case Management

11. At the case management hearing, the case management judge may make any directions necessary to ensure a timely and fair hearing of the appeal, and shall specifically consider whether, after receiving submissions from counsel for the appellant and the Crown/respondent, it is necessary to make directions concerning each of the following matters:

- a. Confirmation that trial counsel has been formally served with a copy of the Notice of Appeal,
- b. The time periods for preparation of any affidavits relied upon by the appellant in support of any allegations impugning the professional conduct of trial counsel to the extent that these materials have not already been prepared.
- c. The time periods for preparation of trial counsel's affidavit and the submission of that affidavit to counsel for the appellant to the extent that this has not already occurred.
- d. The time periods for any editing or redacting of trial counsel's affidavit by counsel for the appellant to the extent that this has not already occurred.
- e. The time period for providing a copy of trial counsel's affidavit to the Crown/respondent, in either (i) unedited form, where counsel for the appellant determines that no editing is required or, (ii) edited form, where counsel for the appellant takes the position that editing is necessary because the affidavit divulges privileged information which is not necessary to respond to the allegations made against trial counsel.
- f. If trial counsel's affidavit has been redacted by counsel for the appellant, the case management judge will, if required, review the original affidavit, the redacted affidavit and the appellant's affidavit, and after hearing from the parties, decide whether solicitor client privilege has been waived by the appellant with respect to some or all of the redacted portions. If so, the case management judge will release these redacted portions to the Crown/respondent.

- g. The time period for the filing of the appellant's application to adduce fresh evidence, including but not limited to any affidavits referred to above.
- h. If either party applies to cross-examine pursuant to *Code* s. 683(1) (b) or (d) on the affidavits filed, the division of the Court hearing the appeal must decide this issue. Such application shall be heard the same week the appeal is scheduled to be heard and by the same division hearing the appeal.
- i. Counsel will advise the case management judge if they wish to cross-examine on any filed affidavit. The case management judge will direct that trial counsel and/or the appellant attend the hearing of the appeal and the application to adduce fresh evidence and be available for cross-examination should the division of the Court so order. If counsel require a subpoena for a witness, they will submit their application for a desk order to the case management judge for the consideration of the Court.
- j. The time period for filing of the appellant's factum after the filing of the affidavits.
- k. The case management judge may provide a memorandum to the division hearing the appeal setting out any orders or directions, with copies to the parties.

#### Stage Four: The Hearing

12. Subject to the directions of the case management judge, a date for the hearing of the appeal shall not be set until:
- a. The appeal books and transcripts have been filed in accordance with the Rules.
  - b. The appellant has filed an application to adduce fresh evidence, identifying any and all affidavits filed.
  - c. All of the matters listed in paragraph 11 (a) through (j) have been considered and/or addressed by the case management judge.

  
The Honourable Chief Justice Bauman  
for the Court of Appeal of British Columbia

History: Replaces the criminal Practice Directive titled *Ineffective Assistance of Trial Counsel*, dated 19 September, 2011 and 1 February 2005.

FORM A

Form letter to impugned trial counsel

Dear Sir / Madam:

**Re: R. v. (name of appellant) CAO \_\_\_\_\_**

As you are aware, the above-captioned individual is appealing his/her conviction from (identify offence(s)) returned on (date) in (level of court). You were counsel at trial for (name of appellant). I represent the Crown/respondent in this matter.

The appellant has alleged in a(n) (amended) notice of appeal filed on (date) that your representation of him/her was ineffective and resulted in a miscarriage of justice. The details of this alleged ineffective representation are contained in the appellant's affidavit sworn (date) and (identify any other supporting material). It is my understanding that (name of appellant's counsel) has served this material upon you.

The Court of Appeal will require a response to these allegations from you in order to properly dispose of this ground of appeal. Your response should be in affidavit form. Please prepare and swear an affidavit responsive to the particulars of the allegations raised against you. To facilitate your doing so, it is my further understanding that (name of appellant's counsel) has delivered to you an express waiver of solicitor-client privilege to the extent necessary for you to respond, signed by the appellant.

It is not my intention to engage in a discussion with you concerning the content of your affidavit other than to point out that a complete response to each and every allegation is desirable. To this end, I'd ask you to have particular regard to the following portions of the appellant's material:

(enumerate applicable or pertinent paragraphs, etc.)

Once your affidavit is sworn, please deliver the original and a copy to (name of counsel for the appellant). (Name of counsel for the appellant) will then vet your affidavit for its adherence to the scope of the waiver of privilege. Do not send a copy to me at this point in time. Should there be any disputes about whether your affidavit exceeds the scope of the waiver, they will be addressed through the case management process currently underway in connection with this appeal under the auspices of (name of case management justice).