The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

WITHDRAWAL OF LEGAL SERVICES

Practice Management Fundamentals

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A. OBJECTIVES

After reading this module you will be able to:

1. **Determine if a circumstance is one where you are <u>required</u> to withdraw your legal services**
2. **Determine if a circumstance is one where you are <u>permitted</u> to withdraw your legal services;**
3. **Describe your obligations to your client when you are withdrawing your legal services ;**
4. **Apply the relevant rules about withdrawing legal services to your own practice;**
5. **Define a solicitor's lien and state its purpose;**
6. **Differentiate between situations where a solicitor's lien does and does not apply to file contents;**

B. CHAPTER IN A NUTSHELL

Withdrawal of Legal Services in a Nutshell

1. The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith and in the client's interests.

2. A lawyer must **not** withdraw from representing a client **unless** there is "**good cause" & reasonable notice** is given to the client as set out in *The Code of Conduct chapter 3.7-1*.

3. Good cause includes **"a serious loss of confidence"** between lawyer and client as described in *The Code of Conduct chapter 3.7-2* which creates **an optional right to withdraw** as counsel.

4. Good cause can be non-payment of fees and disbursements as described in *The Code of Conduct chapter 3.7-3* which creates **an optional right to withdraw** as counsel **provided** there is no serious prejudice to the client.

5. Good cause includes any situation where it is **mandatory** that the lawyer withdraw from representation, such as those described in *The Code of Conduct chapter 3.7-7*.

6. **Reasonable notice** depends upon the circumstances. If the situation is one where withdrawal is optional, generally the client should be given enough notice to retain new counsel before the lawyer ceases to act. If the situation is one where withdrawal is mandatory, reasonable notice to the client might be shorter.

7. Under *The Code of Conduct chapter 3.7-8*, a lawyer must **minimize expense** and **avoid prejudice** to the client in all situations where a lawyer withdraws from representation.

8. If **court or tribunal hearings** are involved the lawyer must take steps to withdraw from the record, no matter what the good cause for withdrawing might be. For example, *QB Rule 15* spells out the requirements that must be met for a lawyer to be removed from the record in that court. The requirements there differ depending upon whether an application to withdraw is made before or after a trial date is set.

9. If a **client's non-payment of the retainer, fees or disbursements is the sole reason** for the lawyer withdrawing, the lawyer will need permission to be removed from the court record and the lawyer must show there will be no serious prejudice to the client. In some circumstances the lawyer's request to withdraw may be refused.

10. If a **contingency fee retainer** is involved, that fact and the reasons for withdrawal will affect how, when and whether the lawyer is paid for the legal services up to the date of withdrawal.

11. In every situation of withdrawal from representation, the lawyer must follow the applicable **manner of withdrawal** set out in *The Code of Conduct chapter 3.7-9*.

12. A lawyer may claim a **solicitor's lien** for unpaid fees and disbursements and hold client property and documents after withdrawing, but **not** in circumstances where to do so would materially prejudice the client

C. THE GENERAL RULES

The relationship between lawyer and client is a fiduciary one. The lawyer has a duty at all times to act both in good faith and in the client's interests.

When it comes to ending the lawyer-client relationship, the client can do so at will.

> ***[9]*** *In Canada it has been held that there is an implied term reserving to the client the right to discharge his lawyer (Sherman v. Manley (1978), 1978 CanLII 1279 (ON CA), 19 O.R. (2d) 531, 6 C.P.C. 136, 85 D.L.R. (3d) 575 (C.A.), citing Elliott v. McLennan (1916), 1916 CanLII 545 (ON CA), 36 O.L.R. 573, 30 D.L.R. 729 (C. A.)).*
>
> *McQuarrie, Hunter v. Foote* 1982 CanLII 489 (BCCA)

The lawyer does not have the same freedom to withdraw services from the client; in general, a lawyer can quit a client only for good reason and on sufficient notice.

The Code of Professional Conduct [*The Code of Conduct*] and the Law Society of Manitoba Rules [*LSM Rules*] impose those restrictions on a lawyer's right to terminate that lawyer-client relationship.

The general rule about withdrawing from representation set out in *The Code of Conduct chapter* 3.7-1 sounds fairly simple and straightforward but it is not the only rule that applies.

> ***3.7-1*** *A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.*

You must not withdraw from representing your client before the client's legal matter is completed unless you have good cause to withdraw and you can give reasonable notice of that withdrawal to the client.

The Code of Conduct chapter 3.7-1 **Commentary 1** adds:

> *Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.*

The Code of Conduct chapter 3.7-1 must be read with *The Code of Conduct chapter* 3.7-8 which adds another general obligation to minimize expense and avoid prejudice to the client when you are withdrawing legal services for any reason. As well, you must do "all that can reasonably be done" to transfer the client's matter to the successor lawyer in an orderly way.

Manner of Withdrawal

3.7-8 *When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.*

A "serious loss of confidence between lawyer and client is a good cause for withdrawal under *The Code of Conduct chapter* 3.7-1, and the Commentary to *The Code of Conduct chapter* 3.7- 2 gives some examples of circumstances that would indicate a serious loss of confidence.

Although non-payment seems like a good cause on which to base your decision to withdraw your services under *The Code of Conduct chapter* 3.7-1, that client's non-payment is not considered a "serious loss of confidence between lawyer and client" under *The Code of Conduct chapter* 3.7-2. Any withdrawal for non-payment is governed by *The Code of Conduct chapter* 3.7-3 and would only be permitted if there is no serious prejudice to the client.

Non-payment of Fees

3.7-3 *If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw in accordance with rules 3.7-8 and 3.7-9 unless serious prejudice to the client would result.*

As well, if a court or tribunal is involved, the court or tribunal rules may impose obligations on the lawyer who wants to withdraw from representation.

The Code of Conduct chapter 3.7-1 only mentions reasonable notice to the **client**, but you are also required to notify opposing counsel or other interested parties that may need to know that you are withdrawing, (*The Code of Conduct chapter* 3.7-9 (g)) and, if court proceedings are involved, you are required to comply with the applicable rules of the Court if you are discharged by the client or want to withdraw from representation (*The Code of Conduct chapter* 3.7-9 (h)).

3.7-9 *Upon discharge or withdrawal, a lawyer must: …*

(g) notify opposing counsel or other interested parties that may need to know; and

(h) comply with the applicable rules of court.

In the Queen's Bench Court of Manitoba, the *Queen's Bench Rules [QB Rules]*, in Rule 15.04, imposes an additional duty on a lawyer of record to continue to represent that party until one of two orders is granted by the court or a Notice of Intention to Act in Person is served by the party on the lawyer of record.

DUTY OF LAWYER TO CONTINUE

15.04 *A lawyer of record shall continue to represent a party in a proceeding until*

(a) the party serves a notice in accordance with rule 15.02;

(b) an order permitting the party to change representation is made under rule 15.02.1; or

(c) an order removing the lawyer from the record is made under rule 15.03.

And Commentary 3 to *The Code of Conduct chapter* 3.3-1 reminds us that the ethical duty of confidentiality, which is wider than the evidentiary rule of lawyer-client privileged communications, continues after you cease to act for a client, whether or not differences have arisen between you and the client.

> ***Confidential Information***
>
> ***3.3-1*** *A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship …*
>
> *Commentary excerpt …*
>
> ***[3]*** *A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.*

If you have to bring a motion to the court to withdraw from the record, what you can say about the reasons for the withdrawal is constrained by *The Code of Conduct chapter* 3.3. You must be mindful to only disclose what is necessary and the disclosure must not harm or prejudice the client's interests in the matter.

Even if you comply with all those rules, the SCC, in *R. v Cunningham 2010 SCC 10* concluded at paragraph 17 that the court has the authority in certain circumstances to refuse counsel's request to withdraw from representation when non-payment of fees is the only reason for the application.

The Code of Conduct chapter 3.7-2 and 3.7-3 spell out situations where your withdrawal from representation is optional, depending upon your judgement of the circumstances.

In situations set out in *The Code of Conduct chapter* 3.7-7, and also in *The Code of Conduct chapter* 3.4-4, 3.4-5(c), 3.4-8(b), 3.2-7, 3.2-8(c), and 3.2-9 Commentaries 2 and 3, (all discussed in more detail below) it is mandatory that you withdraw from representation.

Always be aware of the limitations and obligations on your right to withdraw from representation before the work for that client is complete.

D. WHEN WITHDRAWAL IS OPTIONAL

WHAT GOOD CAUSE WOULD PERMIT YOU TO WITHDRAW FROM REPRESENTING A CLIENT BEFORE THE MATTER IS COMPLETED?

1. The End of a Limited Scope Retainer

Of course, if the terms of your retainer are limited in scope, you have a good cause to withdraw when the terms of the limited scope retainer are completed. With limited scope retainers, it is important to have the terms set out in writing so there is no confusion about when the legal services you have agreed to do are complete.

If you are acting on a limited scope retainer and appear in court as part of that retainer, you must disclose to both the court and the other counsel that your scope of service is limited in advance of appearing in court. In the Court of Queen's Bench, the QB Rules require that you must inform the court that the purpose of your retainer is limited by filing the terms of the limited scope retainer and the client must appear at all proceedings unless the court orders otherwise.

QB Rules:

LIMITED RETAINER

Retaining lawyer for limited purpose

15.01.1(1) If a party to a proceeding who is acting in person or a lawyer of record retains a lawyer to appear before the court for a particular purpose, the lawyer appearing must inform the court of the nature of the appearance before the appearance by filing the terms of the retainer, other than terms related to fees and disbursements.

Duty to appear

15.01.1(2) If a party to a proceeding who is acting in person retains a lawyer for a particular purpose, the party must attend the hearing or proceeding for which the lawyer is retained unless the court orders otherwise.

2. If There is a "Serious Loss of Confidence" Between Client and Lawyer

In situations where there has been a serious loss of confidence between you and your client, *The Code of Conduct chapter* 3.7-2 gives you the option to withdraw from representation.

Optional Withdrawal

3.7-2 *If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw in accordance with rules 3.7-8 and 3.7-9.*

The Commentary to The Code of Conduct chapter *3.7-2 offers some examples where a "loss of confidence" between a lawyer and a client is indicated. You are not required to withdraw in these situations. You must use your own judgement to decide whether the loss of confidence in the particular situation between you and your client is serious enough to warrant your withdrawal from representation.*

Commentary

[1] *A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by a client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.*

a) The Deliberately Deceptive Client

Some examples of the behaviour that might prompt you to consider withdrawing from representation include where the client deliberately fails to tell you important facts or if you discover the client has lied to you. If those omissions or lies affect the trust between you so that the quality of the representation you can provide may be negatively affected, you may withdraw from representation. Generally, the client's deceit should be or appear to be deliberate to be considered a serious loss of confidence.

b) Refusing to Accept and Act on Your Advice on a Significant Point

This does not mean that you should consider withdrawing every time you give your client some legal advice that the client doesn't want to follow. Clients can, for example, refuse to settle a dispute on the terms you recommend and you can take written instructions from the client to confirm that you recommend against the choice the client has made and then continue to act for the client.

However, if you are asked for your legal advice on a matter and the client refuses to accept that advice and wants to proceed to act contrary to that advice in a way that shows the client has lost confidence in you, you are not obliged to continue to represent the client. In that situation, you must balance the client's right to choose to reject that legal advice with the need for the client to have confidence in your advice if you are going to continue to represent the client. Generally, if your client refuses to accept and act on your

advice on a significant point in the matter, you will find that it is clear that the client's confidence in you is broken down.

However, if the client instructs and insists that you do or omit to do something that would be professionally unethical for you as a lawyer, you are **required** to withdraw from representation under *The Code of Conduct chapter* 3.7-7.

c) Persistently Unreasonable or Uncooperative Client

Clients come to you with legal problems that need solutions. Sometimes the clients are in a state of distress and you may be dealing with them at their worst. Some clients are more demanding than others. You will determine what behaviour you will find so objectionable that you feel there has been a serious loss of confidence between you. The client must persist in the unreasonable behaviour in a material respect

Some examples of unreasonable or uncooperative behaviours that might warrant you contemplating withdrawal could include a client who substantially changes instructions so repeatedly that you don't feel you can rely on anything the client says or a client who demands you meet unreasonable deadlines or a client who is careless about giving you complete information as requested or a client who is verbally abusive or insulting.

d) Difficulty Obtaining Adequate Instructions

You have an obligation under *The Code of Conduct chapter* 3.2-2C to obtain your client's instructions for proceeding in a matter. It is not reasonable for a client to ignore your requests or to continually make vague promises to get back to you with instructions. If you have requested instructions from your client that you need to proceed with the client's matter, you have the right to expect the client to respond with those instructions within a reasonable time.

> ***Advising Clients***
>
> ***3.2-2C*** *A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.*

Sometimes you cannot get instructions because you cannot contact the client and the client may seem to have disappeared. Commentary [6] of *The Code of Conduct chapter* 3.2-2C reminds you that you must take reasonable steps to find and contact the client who is not responding.

> ***Commentary***
>
> ***[6]*** *If a lawyer has difficulty contacting a client to obtain instructions, the lawyer ought to take reasonable steps to locate the client. If those efforts fail, the lawyer*

should consider withdrawing in accordance with section 3.7 (Withdrawal from Representation).

Ensure that you keep accurate records of all attempts you make to contact a client who is taking an unreasonable amount of time to give you instructions and/or is not responding. Reasonable steps to locate the client include sending emails or letters and calls or texts several times to the contact numbers and addresses given to you by the client. If the client is active on social media, you might be expected to check popular social media sites like Facebook or Instagram for evidence of your client's location. You should also search the client's name on the internet before concluding your efforts have failed.

It is your professional obligation to maintain regular contact with your client about their matter. If you don't and a client disappears, it can create cost and complications when trying to get off a court record, or if you need to deal with any unbilled time or disbursements or a trust account balance. Remember you cannot transfer any trust money to pay an outstanding account until after you have delivered that account to the client. A client who cannot be located cannot be said to have received the account and you may be put in the position of having trust money that cannot be transferred, even if you are in a position to withdraw from representation. If you do find yourself in such a situation, contact the Trust Account Supervisor of your law firm who may contact the Audit department of the Law Society for assistance and advice.

e) NEVER Force a Hasty Decision on a Difficult Question.

The rule permitting you to withdraw if there has been a serious loss of confidence between you cautions you to be careful to ensure that you are not using the threat of withdrawal as a way to force your client to choose your recommended course of action when there are other ethical ways to proceed in the matter. You must be reasonable about waiting for a client to decide matters that require some serious consideration and prepared to accept that although the client might not accept your recommendation, that does not automatically equal a serious loss of confidence between you.

3. Is Non-Payment Good Cause for Withdrawal?

Note that a client's failure to pay fees or disbursements or a requested retainer is NOT an example of "a serious loss of confidence", but it may be cause for a lawyer to consider withdrawing from representation provided there will not be serious prejudice to the client. Case law also provides that a lawyer who is the counsel of record before a court in a criminal matter has an obligation to the court and requires the court's permission to withdraw. Where the request to withdraw is based on an issue of non-payment, the court will grant or deny leave based on its assessment of any resulting prejudice to the accused and the administration of justice. (See *R. v. Deschamps*, 2003 MBCA 116 (CanLII).

a) No Serious Prejudice to Client can Result from Withdrawal

Non-payment of fees has its own rule in *The Code of Conduct chapter* 3.7-3. You are permitted to withdraw if, after reasonable notice, the client fails to pay you but **ONLY IF** no serious prejudice to the client would result.

> ***Non-payment of Fees***
>
> ***3.7-3*** *If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw in accordance with rules 3.7-8 and 3.7-9 unless serious prejudice to the client would result.*
>
> *(emphasis added)*

If you want to withdraw because your client has not paid your retainer/fees/disbursements you cannot claim that you have an ethical reason to withdraw or that a "serious loss of confidence between you" has arisen as described in *The Code of Conduct chapter* 3.7-2 explained above.

b) What is Serious Prejudice to the Client?

A client might be seriously prejudiced if you cannot give reasonable notice to the client that you want to withdraw from representation. For example, if you want to withdraw for non-payment of fees but between the time you want to cease acting and the time that a significant step in the legal matter must be done there is insufficient time for the client to retain other representation and give the new representative adequate time to get the significant step done, that would be a possible example where serious prejudice to the client would result from your withdrawal.

So, in a situation where an adjournment of the trial date cannot be obtained without seriously prejudicing the client's interests, or if you are too close to a limitation date or a closing for another lawyer to become familiar with the file and reasonably meet the deadline, thus seriously prejudicing the client's legal rights, you may not be permitted to withdraw for non-payment of fees alone.

Inconvenience to the client is not equivalent to serious prejudice. The fact that the client may have to retain new counsel is not automatically considered serious prejudice. For example, if the client refuses to pay you and there is no pending or important deadline imminent, you might successfully argue that there is no serious prejudice to the client and you should be permitted to withdraw under this rule.

Sometimes, if your immediate withdrawal would seriously prejudice the client's interests you will not be permitted to withdraw immediately. You may have to continue to act until

the risk of serious prejudice has passed but once you reach that point in the matter you may be permitted to withdraw for a client's non-payment.

Building a clause in a retainer agreement that permits you to unilaterally end the lawyer-client relationship if the client fails to pay may not be sufficient. *The Code of Conduct chapter* requirement for reasonable notice of withdrawal for non-payment still applies. See *Re A.L., 2003 ABQB 905* at paragraphs 49-51, where the court recognized a strict ethical obligation to notify a client regarding the withdrawal of legal services, even in the face of a clear contractual right to unilaterally withdraw services.

c) Disclosure and Client Confidentiality- Reasons for Withdrawal

You have an ethical obligation to keep your client's information confidential.

For those practicing criminal law, see *R. v. Cunningham*, [2010] 1 SCR 331, 2010 SCC 10 (CanLII) [*Cunningham*] where the court concluded that disclosure of the information that an accused has not paid or will not pay fees is not prejudicial to the accused when it is not linked to the merits of the matter.

Note however that in paragraphs 30-31 of *Cunningham*, the court commented that in other legal contexts such a disclosure might be relevant to the merits of the case or might cause prejudice to the client and the decision should not be understood to affect the lawyer's duty of confidentiality in those contexts.

> ***[30]*** *To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.*
>
> ***[31]*** *...However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.*
>
> *(emphasis added)...*

It is only where the disclosure is unrelated to the merits of the matter and will not cause prejudice to the accused that the disclosure that unpaid fees are the reason for applying for withdrawal does not attract the protection of solicitor-client privilege.

d) Refusing Counsel's Request to Withdraw

The Supreme Court of Canada in *Cunningham* at paragraph 17, concluded that a court has the authority to refuse criminal defence counsel's request to withdraw for non-payment of fees.

The SCC reviewed the divergent views across Canada's courts on the right of the court to refuse counsel's request to withdraw and in paragraph 15 of *Cunningham* the court commented on the Manitoba Court of Appeal decision *R v Deschamps*, 2003 MBCA 116 (CanLII):

> ***[15]*** *The Manitoba Court of Appeal has also considered the court's power to refuse counsel's request to withdraw for non-payment of fees: R. v. Deschamps, 2003 MBCA 116 (CanLII), 177 Man. R. (2d) 301. It agreed with the Alberta Court of Appeal that a court has the authority to refuse withdrawal. However, Steel J.A. determined that the assessment should be based on whether allowing withdrawal would cause prejudice to the accused and to the administration of justice (para. 24).*

The SCC reasoned that the superior court's inherent jurisdiction to ensure it can fulfill its mandate to administer justice includes the authority to control the process and to exercise some control over counsel as key actors if necessary, to protect its process.

> ***[18]*** *It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.*

And in dealing with non-superior courts, the SCC applied its own decision that a statutory court has a "doctrine of jurisdiction by necessary implication" to ensure it can function as a court of law. That implied authority includes the authority to exercise some control over counsel's applications to withdraw or be removed for any reason.

> ***[20]*** *Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.*

In criminal cases at least, when the only reason for the lawyer's request is the client's non-payment of fees, *Cunningham* states that the court can exercise its discretion to refuse a lawyer's request to withdraw from representing the accused.

> ***[50]*** *If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (C. (D.D.), at p. 327).*

The court cautioned that the decision to refuse an application to withdraw should not be made lightly and "should truly be a remedy of last resort".

> ***[45]*** *Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.*

e) Withdrawal if a Client Cannot or Will Not Pay the Lawyer?

When reasonable notice is given to the client and the court so that no proceedings need to be rescheduled, the court in *Cunningham* stated that the court should accept the lawyer's application to be removed as counsel of record without more inquiry.

> ***[47]*** *If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.*

If reasonable notice is **not** given, a court may ask more questions about the reason for the application. If solicitor-client privilege is not engaged, says *Cunningham*, counsel may disclose that the application is for non-payment of fees. If the reasons for the application involve ethical issues like serious loss of confidence or one of the mandatory reasons to withdraw, counsel can disclose only that there are ethical reasons for withdrawing. In that case, the court should accept counsel's declaration of the reasons at face value and not inquire further. However, the court in *Cunningham* explicitly says that counsel should **not** claim that the reason for withdrawing is ethical if the only reason for the application to withdraw is the non-payment of fees.

> ***[48]*** *Assuming that timing is an issue, the court is entitled to enquire further. … Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. … If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, 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.*
>
> *(emphasis added)*

The reason for withdrawal is important because if the lawyer has an ethical reason for withdrawing, the court must permit the lawyer to withdraw, even if there is not reasonable notice.

> ***[49]*** *If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see C. (D.D.), at p. 328, and Deschamps, at para. 23). … It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.*

However, if the reason for seeking withdrawal is non-payment of legal fees only, and the reasonable notice needed in the circumstance is not given, the court has the discretion to refuse to permit the lawyer to withdraw from the record, even if the lawyer will not be paid for the legal services. In *Cunningham*, the court sets out a "non-exhaustive list of factors" to consider in exercising its discretion:

> ***[50]*** *In exercising its discretion on the withdrawal request, 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 gave reasonable notice to the accused to allow the accused to seek other means of representation, or 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 proceedings;*
>
> *the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.*

> *As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.*

If the only "harm" is the administrative inconvenience of rescheduling, for example, the court says that is not enough to equal the "serious harm" needed to support a court's refusal.

> ***[51]*** *Harm to the administration of justice is not simply administrative inconvenience … Harm to the administration of justice recognizes that there are other persons affected by ongoing and prolonged criminal proceedings: complainants, witnesses, jurors and society at large. Because of this, I would respectfully observe that the consideration suggested by the Alberta Court of Appeal in C. (D.D.) of whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.*

The SCC commented favourably on the Manitoba Court of Appeal decision in R. *v. Deschamps*, 2003 MBCA 116 as an example of the appropriate exercise of the court's discretion to refuse counsel's application to withdraw.

[52] *The Manitoba Court of Appeal's decision in Deschamps offers a useful example of the appropriate exercise of the court's discretion. Defence counsel was representing the offender in a dangerous offender proceeding. Five days into the proceeding counsel requested an adjournment to allow the offender to be assessed for and receive treatment. The matter was remanded for approximately eight months. During this time difficulties arose with legal aid funding. Because the dangerous offender proceedings were of high complexity, counsel was initially promised a higher fee than provided by the regular tariff. "Financial difficulties" called into question Legal Aid's ability to follow through with the commitment to a higher fee. Defence counsel sought to withdraw due to Legal Aid's alleged breach of contract.*

[53] *The motions judge determined that there was no breach of contract. However, she found that even if there had been a breach, she would have refused counsel's request to withdraw. In the Court of Appeal, Steel J.A. upheld this decision. She agreed with the motions judge that the factors relevant to denying withdrawal were: the proceeding was serious and complex, the offender could not represent himself, the proceeding had already begun, there was no immediate prospect of obtaining another lawyer, and the offender was a difficult client who had finally developed a relationship of trust and confidence with this particular counsel. The Court of Appeal agreed with the motions judge that further delay would have resulted from allowing withdrawal and would have caused serious prejudice to the offender. The Court of Appeal noted that after the initial motion, Legal Aid ensured that fees would still be paid, just not at the higher rate. Counsel's application to withdraw was refused.*

[54] *I simply emphasize that the threshold for refusing leave to withdraw is a high one and requires a proper basis in the record for its exercise.*

If an appeal of a superior court's decision to deny an application to withdraw is necessary, Cunningham suggests that s. 40 of the Supreme Court Act be used to appeal, analogous to the process followed in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835.

Two examples of errors of law in a court's exercise of its discretion as part of the inherent or necessarily implied jurisdiction to refuse withdrawal are set out in *Cunningham* in paragraph 58:

1. refusing withdrawal when counsel seeks it for ethical reasons or
2. a court failing to consider a relevant factor when faced with a withdrawal application for non-payment of fees.

The court sums up its decision in paragraph 59:

> ***[59]*** *This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.*
>
> *(emphasis added)*

4. Withdrawal if a Client is Incapable

In every case where you perceive the potential client has diminished capacity, you must assess whether or not you can accept a retainer. If the impairment is minor, a client with diminished capacity may still be capable of giving instructions.

3.2-9 *…*

Commentary excerpts

[1] *… Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.*

If you believe that a potential client is incapable of giving instructions, *The Code of Conduct chapter* 3.2-9 Commentary 2 provides that you should not enter into a client-lawyer relationship.

> ***Commentary***
>
> ***[2]*** *A lawyer who believes a person to be incapable of giving instructions should decline to act. …*

But if you reasonably believe that the person has no other agent or representative and that there could be imminent and irreparable harm to the person if no action is taken, you may act for the person without capacity only to the extent necessary to protect the person until a legal representative like the Office of the Public Guardian or a litigation guardian can be appointed.

During an existing client-lawyer relationship, if you determine that for some reason the client is no longer capable of making decisions or giving instructions, you should decline to act further in the legal matter. You are not required to immediately withdraw from representation, but should assess the circumstances, consider the importance and urgency of getting instructions, and act to preserve and protect the client's interests until a legal representative can be appointed.

Example:

You have been acting for an elderly client for many years on various business and personal matters. Your elderly client is sued and retains you to defend the suit. When the client returns to the office with documentation at the next appointment, it becomes apparent to you that the client is acting confused and appears not to understand what the appointment or the legal matter is about. The other party is pressing for a defence to be filed. You are concerned that your client no longer has capacity to give you instructions. You may immediately withdraw from representing that client, but you have an ethical obligation to ensure your client's rights are not abandoned.

> The Code of Conduct chapter ***3.2-9 Clients with Diminished Capacity***
>
> ***Commentary***
>
> *[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of*

any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, a lawyer should act to preserve and protect the client's interests.

In this example, to protect the client's interests, you may stay on as the elderly client's lawyer solely to get an extension from the other side for filing a defence while you apply to have the help of the Public Guardian to protect the interests of your elderly client for the future. Once the Public Guardian has agreed to take over the matter, you have protected the client's interests and you must then withdraw from representation.

5. Optional Withdrawal – Lawyer's Personal Reasons

If you are appointed to the Bench, or are taking parental leave or are cutting down on the volume of your practice by choice for health or lifestyle reasons, those personal reasons are good cause for permitting you to withdraw from representation provided you give reasonable notice to the client.

Sometimes in those circumstances, it might mean that you or the law firm have to give the client the choice of changing to another lawyer in the same firm, or choosing a lawyer in a different law firm, or electing to have no legal representation.

In any of these situations, you and the law firm have an ethical obligation to minimize the client's expense and avoid prejudice to the client's interests and you must follow *The Code of Conduct chapter* 3.7-9 for Manner of Withdrawal if the client chooses to leave the law firm.

An example of the obligation to minimize a client's expense in this situation would be if the client chooses to stay at the firm with a different lawyer, the client cannot be charged for the time it will take for that new lawyer to become familiar with the file.

E. WITHDRAWAL BEFORE COMPLETING A CONTINGENT FEE AGREEMENT

If you have entered into a contingency agreement with your client and you want to withdraw from representation before the matter is concluded, you are not permitted to do so unless you are required to withdraw for the ethical reasons set out in *The Code of Conduct chapter* 3.7-7 or you have a clause in your contingency agreement with the client that specifically addresses such a situation in detail.

The Commentary to *The Code of Conduct chapter* 3.6-2 states that

> ***Commentary***
>
> ***[2]*** *… a lawyer cannot withdraw from representation for reasons other than those set out in rule 3.7-7 (Obligatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.*

The nature of a contingent retainer is that you agree to take on the risk of acting in the matter to completion, so if you withdraw before the matter is completed for any reason other than a *Code of Conduct chapter* 3.7-7 Obligatory Withdrawal reason, you breach the essential term of the contract.

> ***Obligatory Withdrawal***
>
> ***3.7-7*** *A lawyer must withdraw if: (a) discharged by a client; (b) the client persists in instructing the lawyer to act contrary to professional ethics; or (c) the lawyer is not competent to continue to handle a matter.*
>
> ***Commentary***
>
> ***[1]*** *In a situation calling for obligatory withdrawal pursuant to this rule a lawyer must still comply with rules 3.7-8 and 3.7-9 before discontinuing representation of the client. In a matter before the court a lawyer would therefore be required to seek an order permitting the withdrawal.*

Be careful in drafting the terms of your contingency agreement with the client. If you are discharged by the client for good cause before the contingency agreement is completed you will not have a claim for compensation for the legal services up to that date unless the contingency agreement specifically addresses the consequences of such a circumstance.

If **you** are required to withdraw from a contingency retainer for an ethical reason as set out in *The Code of Conduct chapter* 3.7-7 (b), you will be able to claim compensation for the legal services provided up to the time of withdrawal on a *quantum meruit* basis. However, the payment will not be payable by the client until the contingent matter is concluded unless the terms in the contingency agreement address that circumstance.

It would be wise to negotiate and include a provision in any contingency agreement you draw that specifically addresses what circumstances permit you to withdraw and what will be the agreed consequences of your withdrawal from representation or if the client discharges you before the matter is concluded.

Practice Tip:

When entering into a contingency fee agreement, consider including terms that permit you to withdraw from the agreement for any good cause other than just the reasons set out in *The Code of Conduct chapter* 3.7-7.

Address how you will be paid in the event you or the client end the contingency agreement before the matter is completed.

Ask yourself: Should the client have to pay for all disbursements immediately whenever the agreement is terminated for any reason? If you withdraw for good cause or are discharged by the client for no good cause should payment for your legal services be payable immediately rather than at the conclusion of the legal matter? Should you be entitled to payment based on a set hourly rate, or to a percentage of the expected or actual award or settlement or whichever is higher? Should you be entitled to be paid for legal services no matter how the legal matter is concluded if the client discharges you for no good cause?

F. WHEN WITHDRAWAL IS MANDATORY

1. Withdraw In all Code of Conduct chapter 3.7-7 Situations

The Code of Conduct chapter 3.7-7 states you must withdraw your legal services if you are fired by the client or if the client "persists in instructing" you to act unethically or if you become incompetent to continue to act for the client.

> ***Obligatory Withdrawal***
>
> ***3.7-7*** *A lawyer must withdraw if:*
>
> *(a) discharged by a client;*
>
> *(b) the client persists in instructing the lawyer to act contrary to professional ethics; or*
>
> *(c) the lawyer is not competent to continue to handle a matter.*

Even when required to withdraw under *The Code of Conduct chapter* 3.7-7, you have the continuing ethical obligation to keep the client's confidences, to minimize the expense to the client when withdrawing and to avoid prejudicing the client's interests.

a) A Lawyer Must Withdraw if Discharged by a Client

Remember, a client always has a choice of counsel, so the client can discharge you for any reason, good or not. If you are fired, follow the steps in *The Code of Conduct chapter* 3.7-8 and 3.7-9 and ensure you are removed as counsel of record on any court or other proceedings.

b) A lawyer Must Withdraw if the Client Persists in Instructing the Lawyer to Act Contrary to Professional Ethics

A lawyer is not bound to do whatever a client requests or instructs. If a client asks you to act in any way that is contrary to professional ethics, you should first advise the client that the action is not permitted and explain why and inform the client that if the client insists on those actions, you must cease acting for the client. If the client persists after that advice, then you must not act contrary to professional ethics and must withdraw from representation.

There is a general prohibition against a lawyer knowingly assisting or encouraging anyone to act illegally, dishonestly or commit a crime or fraud under *The Code of Conduct chapter* 3.2-7. As well, a lawyer cannot do or omit to do anything that the lawyer ought to know assists or encourages that behaviour by a client or others. And despite the

messages on *How to Get Away with Murder*, you are prohibited from instructing a client or others on how to violate the law and avoid punishment. While money-laundering or business frauds are often the kinds of actions that bring this *Code of Conduct chapter* 3.2-7 into play, you should always ask as many questions as possible when taking instructions to avoid unwittingly becoming the tool for an unscrupulous client or anyone else, even if that person is not associated with the client.

Commentary

[3] *If a lawyer has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client or others and, in the case of a client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.*

Implied in *The Code of Conduct chapter* 3.2-7 is the obligation on you to withdraw if you find yourself in one of those situations and because of *The Code of Conduct chapter* 3.7-7 (b), if the client persists in instructing you to breach any of those prohibitions, you must withdraw.

Be aware of the very limited exception where the prohibition against assisting someone to do something illegal does not necessarily apply. If a bona fide test case of the law requires a technical breach that does not involve any injury to a person or violence and provided the client is acting in good faith and on reasonable grounds, the rule does not preclude you from representing and advising the client. See *The Code of Conduct chapter* 3.2-7, Commentary 4

[4] *A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.*

c) A lawyer Must Withdraw if the Lawyer is Not Competent to Continue to Handle a Matter.

Under *The Code of Conduct chapter* 3.1, the lawyer owes a duty to be competent to act for the client.

It seems obvious that if you are not competent, you must withdraw. However, incompetence has a very wide meaning and is not limited to negligent or reckless actions. Incompetence can mean you do not have adequate knowledge of the specific area of law or the relevant process involved in this one matter or you do not have enough experience in the client's particular problem and it would not be in the client's interests for you to take the time to become knowledgeable or experienced enough to be competent.

If you are struggling with an alcohol or drug (legal or illegal) dependency or addiction, or a physical or mental health issue, or feel so overburdened with workload or personal relationship issues that your ability to do the best legal work for the client is being affected, you can conclude that, at this time in your life or practice, you are not competent to continue to represent the client.

Withdrawing from representation when you feel incompetent is an ethical withdrawal and withdrawing can include referring the client to another lawyer in the same firm who is able to represent the client.

2. The Law Society Rules

In addition to the obligations set out in the Code, the *LSM Rules* 5-128 and 5-129 state that you must withdraw from representing any client if you know or ought to know that you would be assisting a client in fraud or other illegal conduct by continuing. That applies both if you discover the information during the time that you are confirming the client's identification or if you discover the information during the time that you represent the client.

LSM Rules

Division 12 - Client Identification and Verification

Criminal activity: duty to withdraw at time of taking information

5-128(1) *If, in the course of obtaining the information and taking the steps required in rules 5-118, 5-120(1) or 5-121, a member knows or ought to know that he or she would be assisting a client in fraud or other illegal conduct, the member must withdraw from representation of the client. (AM. 01/09) ...*

Criminal activity: duty to withdraw after being retained

5-129(1) *If, while retained by a client, a member knows or ought to know that he or she would be assisting the client in fraud or other illegal conduct, the member must withdraw from representation of the client. (AM. 01/09)*

3. Acting in the Same Firm for Competing Interests and an Unresolvable Dispute Develops

Sophisticated clients might want you and a colleague in the same firm to represent them on a matter where they do not anticipate any disputes. That is permitted under *The Code of Conduct chapter* 3.4-4 provided that:

- you each inform your potential client of the risks and
- you recommend that the client gets independent legal advice in the matter and on the risks of concurrent representation and
- the clients each decide that it is in their best interests to have concurrent representation and
- the clients each consent and are each represented by a different lawyer in the firm and
- you put appropriate screening mechanisms in place in your firm to protect each client's confidential information, and
- you must also make it clear that all lawyers will withdraw if an unresolvable dispute develops among the clients.

The Code of Conduct chapter 3.4-4 makes it mandatory that all lawyers must withdraw if an unresolvable dispute develops among the clients

> ***3.4-4*** *Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that: …*
>
> *(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.*
>
> ***Commentary***
>
> ***[1]*** *This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.*

4. If an Organization Continues-With or Intends to Pursue Wrongful Conduct after Advice to the Contrary

The Code of Conduct chapter 3.2-8 (c) requires a lawyer to withdraw from acting for a client-organization if the organization's proposed conduct will likely result in substantial harm to the organization.

This obligation to withdraw is imposed on you only after you have shared the advice that the proposed conduct is wrongful to the relevant persons in the organization right up the ladder of authority and despite that, the organization continues with the wrongful conduct. Wrongful conduct is conduct that is dishonest, fraudulent, criminal or illegal and includes acts of omission. The withdrawal in some cases might require resignation from your position or relationship with the organization.

Dishonesty, Fraud when Client an Organization

3.2-8 *A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7: …*

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary excerpts

[2] *This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission.*

[3] *… Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.*

[5] *… In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.*

5. If an Unresolvable Contentious Issue Arises Between Clients on a Joint Retainer -

Before accepting a joint retainer where you will act in in a matter or transaction for more than one client, *The Code of Conduct chapter* 3.4-5(c) requires, among other requirements, that you advise each of the clients that if a conflict develops that cannot be resolved you cannot continue to act for both or all of them and may have to withdraw completely.

If you are acting on the joint retainer and a contentious issue arises between or among the clients on that retainer, you cannot participate in any efforts by the clients to resolve it themselves. If the contentious issue is not resolved, *The Code of Conduct chapter* 3.4-8 (b) requires you to withdraw from the joint representation.

> ***Joint Retainers***
>
> ***3.4-8*** *Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer: …*
>
> *(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.*

The Code of Conduct chapter 3.4-9 permits you to continue to advise one of the former joint clients provided all of them agreed to such an arrangement at the time of entering into the joint retainer and the Commentary clarifies that all parties must also consent to you continuing to represent one of them at the time the contentious issue develops.

> ***3.4-9*** *Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.*
>
> ***Commentary***
>
> ***[1]*** *This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.*
>
> ***[2]*** *When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.*

G. REASONABLE NOTICE OF WITHDRAWAL

1. What is Reasonable Notice?

The question of what is reasonable notice of withdrawal of representation is based on the amount of written notice that a lawyer gives to the client before the lawyer ceases to act. As a general rule, reasonable notice means that the client should be given sufficient time to retain and instruct replacement counsel. Of course, what is reasonable will depend on the context.

If you are withdrawing because the client cannot be located, you must make reasonable efforts to serve the client with advance notice of the withdrawal in order to meet the ethical obligation to give reasonable notice.

In situations where withdrawal is mandatory (*The Code of Conduct chapter* 3.7-7), the length of time between service of the notice on the client and when you cease to act will not necessarily be the same length of time as will be needed in situations where you are withdrawing for non-payment of fees (*The Code of Conduct chapter* 3.7-3) . The length of time that will equal "reasonable notice" will be much shorter when withdrawal is for ethical reasons.

If the definition of reasonable notice is set out in a statute or court rules, that definition will govern. In the Queen's Bench courts for example, under *QB Rule 15.04* you have a duty to continue as lawyer of record until the client serves you with a notice of intention to act in person, or the court makes an order permitting the client to change lawyers or the court makes an order removing you from the record.

> ***Queen's Bench Rule***
>
> ***DUTY OF LAWYER TO CONTINUE***
>
> *15.04 A lawyer of record shall continue to represent a party in a proceeding until*
>
> *(a) the party serves a notice in accordance with rule 15.02;*
>
> *(b) an order permitting the party to change representation is made under rule 15.02.1; or*
>
> *(c) an order removing the lawyer from the record is made under rule 15.03.*

a) Where No Trial Date is Set

Where no trial date is set, the process for you to follow to be removed from the court record is fairly straightforward. Notice is given to all parties and the court. If there is a mandatory reason for the withdrawal or if there is a serious loss of confidence between

you and the client, the order will be made. If the withdrawal is for non-payment of fees only, the order will be made provided there is no serious prejudice to the client or the administration of justice. Because no trial date is set the issue of whether there has been reasonable notice to the client is not usually contentious.

b) Where a Trial Date is Set

Where a trial date is set and you bring a motion to be removed from the record, the situation is different. in time past, if a trial date was already set but a lawyer brought a motion to be removed from the record and there was insufficient time for the client to retain and instruct new counsel before the set trial date, counsel on all sides could agree among them that a trial date would be adjourned so that the client would have reasonable notice to retain new counsel if desired.

However, since January 1, 2018, after a trial date is set in civil matters, the *QB Rule 50.07(4)* provides that the scheduled trial date may only be adjourned by the Chief Justice or his or her designate on the request of a party or the pre-trial judge.

> ***Queen's Bench Rule***
>
> ***Adjourning scheduled trial dates***
>
> ***50.07(4)*** *A scheduled trial date may only be adjourned by the Chief Justice or his or her designate on the request of a party or the pre-trial judge.*

If the Chief Justice or designate decides that the scheduled trial date will not be adjourned, the counsel applying to withdraw for an ethical reason should still be able to get an order to get off the court record as counsel, despite the short time between the notice and the trial date. But the lawyer who is withdrawing because of non-payment of fees might find that the fixed trial date means the client has not had reasonable notice and ethically the lawyer cannot withdraw if the client will suffer serious prejudice.

Under *The Code of Conduct chapter* 3.7-1 Commentary 2 the governing principle is:

> ***[2]*** *… that the lawyer should protect the client's interests to the best of the lawyer's ability 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. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. See The Code of Conduct chapter 3.7-8 and 3.7-9 (Manner of Withdrawal). –*

Note: Before you set a trial date in a civil matter, you would be wise to secure payment of your expected fee so that you will not need to withdraw for non-payment of fees once the date is set.

Whenever possible you should ensure the client gets a notice in writing that you will withdraw from representing the client well in advance of the time you will stop acting and the notice should clearly set out the date you will cease to act so there is no room for misunderstanding.

If there is no court involved in the client's legal matter, your withdrawal must still give the client reasonable notice which will likely also be defined as enough notice to give the client sufficient time to retain another lawyer before you cease acting. If there is insufficient time between the time you want to cease acting for non-payment of fees and an important date in the legal matter so that there would be serious prejudice to the client if you withdrew immediately, you might be ethically bound to continue to act for the client without the fee payment at least until a time when there would not be any serious prejudice to the client if you withdraw.

Caution:

Be cautious about agreeing to act when there is an imminent limitation date unless you are experienced in the legal area and willing to accept the risk of non-payment or malpractice because of the short preparation time. If you accept the retainer but then find the client will not or cannot pay, you will not have the reasonable time required under *Rule 3.7-1* to permit you to withdraw if the limitation date is imminent, so you will have the professional obligation to do the necessary legal work to preserve the client's claim anyway in order to prevent the serious prejudice of a lost right of action.

H. OBLIGATIONS WHEN WITHDRAWING

1. Three General Obligations

The Code of Conduct chapter 3.7-8 sets out three obligations on every lawyer who withdraws from representation;

1) minimize expense,

2) avoid prejudice to the client,

3) do all that can reasonably be done to facilitate the transfer of the matter:

> ***Manner of Withdrawal***
>
> ***3.7-8*** *When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.*

Once a decision has been made to withdraw from the matter, you should act as soon as possible to give the client notice. The more notice that you can give the client before anything urgent or important is due, the more easily you can withdraw.

2. Manner of Withdrawal

The Code of Conduct chapter 3.7-9 sets out 8 steps in paragraphs (a) to (h) that must be followed whenever you withdraw or are discharged, for any reason.

> ***Manner of Withdrawal***
>
> ***3.7-9*** *Upon discharge or withdrawal, a lawyer must:*
>
> *(a) notify the client in writing, …*
>
> *(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;*
>
> *(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;*
>
> *(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;*
>
> *(e) promptly render an account for outstanding fees and disbursements;*

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client;

(g) notify opposing counsel or other interested parties that may need to know; and

(h) comply with the applicable rules of court.

a) Notify the Client in Writing

The rules require that you write to the client stating that you are no longer acting and why. If you are a member of a firm the letter should state that the firm is no longer acting for the client either.

If there is pending litigation the letter must state that the client should expect that the matter will proceed on the set date and the client should retain new counsel promptly.

The letter is required even if the client is firing you, with or without good cause.

> ***3.7-9*** *Upon discharge or withdrawal, a lawyer must:*
>
> *(a) notify the client in writing, stating:*
>
> *i. the fact that the lawyer has withdrawn;*
>
> *ii. the reasons, if any, for the withdrawal; and*
>
> *iii. in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;*
> *…*
>
> ***Commentary excerpts***
>
> ***[1A]*** *Steps taken to withdraw should be taken promptly so as to minimize any possible prejudice and costs to the client.*
>
> ***[1B]*** *If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that both the lawyer and the firm are no longer acting for the client.*

b) Deliver the Client's Property and Papers

If you hold any of the client's property, subject to your right to assert a solicitor's lien for billed but unpaid fees or disbursements, you must deliver that property to the client or if the client gives a written authorization to deliver it to someone else, you must deliver the client's property as directed.

Manner of Withdrawal

3.7-9 *Upon discharge or withdrawal, a lawyer must:*

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled; …

Also subject to your right to assert a solicitor's lien for billed but unpaid fees and/or disbursements, the client is entitled to all of the contents of the file, including any legal opinions for which the client has paid. The client owns all original documents given you for the matter, all original legal documents created for or as a result of the legal matter (e.g. minute books, articles of incorporation, separation agreements, settlement contracts, signed court orders, all notes of witness interviews, all original legal memos created for the matter (they paid for the research, but you can keep a copy), original transcripts of proceedings).

You own your original notes, time dockets, internal memoranda, internal emails and the firm's computer-generated internal billing records copies of forms filed, original letters from your client, including your client's instructions and the retainer agreement setting out your authority to act. Keep copies of key documents which include client identification and verification information. There may be other key documents to retain depending upon the nature of the legal work you did. For example, if you had been retained to take instructions to draft a Will, keep your notes about capacity and undue influence made at the time of the instructions.

If you want to keep a copy of the contents of the file for your or the law firm's records, the cost of copying the file will be borne by you. Keep documents that might help you defend against an action for professional misconduct or negligence.

Take time to consult document retention requirements (see the material in Practice Management on *File Retention*) to ensure you are keeping all documents that you are required to retain in a closed file. (e.g., trust accounting records).

For example, the client trust ledger is the financial history of the file. You are required by the *LSM Rules* to retain the client trust ledger in your file when you close it so that would include the situation where your firm has withdrawn from representation or been discharged by the client. The rules provide that the original client trust ledger should be kept in your office in your closed file and a copy of the client trust ledger should be sent to the client or the successor lawyer with the client's other documents.

There is more flexibility now that firms are permitted to keep universally readable format storage of accounting records (PDF), so delivery of an e-copy of the client trust ledger to

a new lawyer is permitted. However, in the case where the firm is still using paper based records, particularly handwritten ledger cards the firm must maintain the original client trust ledger on their closed file and provide a copy or scan with the file when the client is leaving the firm.

It is important for firms to remember that all financial documents must be maintained, and that extends beyond the ledger cards. For example, any third party invoices paid by the firm (from the trust or general accounts), payments to the Property Registry, etc. all form part of the financial history but often live in the file. If the file is being transferred, these documents need to also be kept by the firm (paper or electronic copy).

LSM Rules *Retention of records*

5-54(1) *A member must: (a) keep the books, records and accounts referred to in this division for at least ten years; and (b) on the completion and closing of a client's file, maintain an electronic copy in a universally readable format on the electronic file or place on the file a copy of the individual client trust ledger. (AM. 06/05; 12/18)*

Practice Direction **94-02** - *Transfer of Open Files to New Lawyer* gives guidance on what should be given to the client when the lawyer is discharged or withdraws from representation, and what the lawyer might want to copy to keep.

... the client or the client's new lawyer is entitled to receive the original of all correspondence, pleadings, written legal memoranda, medical and other expert reports, and other such documents.

The lawyer who has withdrawn or been discharged is entitled, if the lawyer so wishes, to keep only his or her notes of meetings, memoranda to file, or other such notes intended to be for the lawyer's own use. ...

A lawyer who has been discharged or who has withdrawn from the case may wish to keep a copy of the file for [their] own benefit. For example, the lawyer may find a copy of the file beneficial in the event of a future complaint of misconduct or an allegation of professional negligence.

... [l]f a lawyer wishes to make a copy of the file before transferring it, this should be done at the lawyer's own expense as it is solely for the lawyer's benefit, and it is improper to charge one's former client for the photocopying costs. Similarly, it is improper to impose a trust condition on the client's new lawyer purporting to require payment of such photocopying charges or to require the file be made available on request by the former lawyer.

c) Solicitor's lien

A solicitor's lien is a legal right of an unpaid solicitor *(in Manitoba it applies to all lawyers who are called as both barristers and solicitors*) who possesses the client's file and/or the client's property, to retain possession of the client's file and other property until the outstanding legal account for services and disbursements has been paid.

> *Commentary*, *The Code of Conduct chapter* ***3.6-13****.*
>
> ***[1]*** *A lawyer is entitled to assert a solicitor's lien over files, documents, money or other personal property of a client which is in the possession of the lawyer until the client has paid all of the lawyer's outstanding accounts. This retaining lien is possessory only and there are no means by which a lawyer can actively enforce it. As a general rule, however, a lawyer is not obliged to give copies of file material to the client or new counsel or even allow inspection of this property while asserting a lien. …*

i. Discharge or Withdrawal and Solicitor's Liens

If you are discharged without cause by the client, or you withdraw for good cause, or you are constructively dismissed, and your account for fees and/or disbursements is unpaid, you are entitled to a solicitor's lien on the contents of the client's file or the client's property in your possession. That means you do not have to release the client's file or property to the client or let the client have copies of any of it until your fees and disbursements are paid, unless to do so would materially prejudice the client.

However, if you withdraw without cause, the solicitor's lien is lost.

> *Commentary, The Code of Conduct chapter* ***3.6-13****.*
>
> ***[1]*** *… Conversely, a lawyer who withdraws without just cause in the course of a matter loses the possessory lien over the client's documents and must deliver the materials to the client or new solicitor.*

The lien is intended to provide you with some security for the debt owed by causing the client some inconvenience. But there are ethical limits to the existence and the enforcement of a solicitor's lien

> *Commentary, The Code of Conduct chapter* ***3.6-13****.*
>
> ***[1]*** *… Some original documents such as corporate records required by law to be kept elsewhere cannot be the subject of a solicitor's lien.*

The Code of Conduct chapter **3.7-9** Commentary excerpts …

> ***[2]*** *If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter. See rule 3.6-13.*

If the client is unable to pay and keeping the client's property and papers from the client or successor lawyer will materially prejudice the client's position, you must release the property and file so that **the client is not materially prejudiced.**

> ***Solicitor's Lien***
>
> ***3.6-13*** *A lawyer must not assert a solicitor's lien against property of a client who is unable to pay the lawyer's account in circumstances in which to do so would materially prejudice the client.*

Material prejudice is more than mere inconvenience to the client. If retaining the file just means the successor lawyer cannot get started on the matter but there are no pending important deadlines to be met, the inconvenience to the client of not being able to get the documents immediately would not likely be seen as material prejudice.

If there are conflicting claims to the property in your possession, which sometimes happens in estate matters for example, you should "make every effort to have the claimants settle the dispute."

When determining whether to claim a lien, you should consider the obligations spelled out in *The Code of Conduct chapter* 3.6-13. If your client is prepared to enter into an agreement with you to pay your account by regular monthly payments to pay off your outstanding account within a year, that might be a situation where Commentary 3 of *The Code of Conduct chapter* 3.6-13 would suggest that you should not enforce a solicitor's lien for non-payment.

> *Commentary*, *The Code of Conduct chapter* ***3.6-13****:*
>
> ***[3]*** *… For example, a solicitor's lien should not be enforced when a trial or hearing is in progress or imminent. Nor should a lawyer enforce a solicitor's lien for non-payment if the client is prepared to enter into an agreement that reasonably assures the lawyer of payment in due course.*

ii. Contingency Agreements and Solicitor's Liens

If you have a contingency agreement with the client, there are special considerations that apply if you are discharged or you withdraw for good cause before the end of the matter.

> *Commentary, The Code of Conduct chapter **3.6-13**.*
>
> ***[4]** Special considerations apply where a lawyer retained under a contingency agreement seeks to assert a lien for unpaid fees. This is because a contingent fee is generally not collectible until the completion of the matter. …*

Unless the contingency agreement has a term that specifically provides that you are entitled to payment for all legal services to date immediately upon being discharged or withdrawing for cause, you will have to wait for payment until the matter is completed. Even payment of outstanding disbursements is not due until the end of a contingent matter by the definition of a contingency agreement so you cannot insist that the client immediately pay the outstanding disbursements unless the contingency agreement provides that you are entitled to full payment of the disbursements regardless of the outcome of the litigation.

As set out in Commentary 4 of *The Code of Conduct chapter* 3.6-13, if you don't have any term in the contingency agreement to address what should happen if you are discharged or have to withdraw before the matter is completed, you may be able to impose a trust condition on the successor lawyer releasing the file on the condition that your fees are paid at the conclusion of the matter. If the successor lawyer agrees to accept that trust condition, remember that you must also acknowledge that the client will keep the right to have your account assessed or arbitrated, despite the trust condition.

d) Share Relevant Information About the Client's Matter

If you have other relevant information about the matter that is not in the papers or property you give to the client, you must pass on that information to the client, subject to any trust conditions.

> ***3.7-9** Upon discharge or withdrawal, a lawyer must: …*
>
> *(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;*

For example, if you accepted a trust condition to register a transfer of land and pay out the sale proceeds to the vendor's lawyer and your client fired you for a capricious reason after the trust conditions were accepted but before you could take any steps, you are

bound by those trust conditions you have accepted and undertakings you have given as a lawyer, no matter what your client's position might be.

Undertakings and Trust Conditions

7.2-11 *A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.*

The client is bound by the actions you took that were within your retainer at the time. So, in transferring the file to a successor lawyer or the client, you cannot give the vendor's transfer of land to the client until you deal with the trust conditions and your undertakings.

Generally, the vendor's lawyer would agree to transfer the trust conditions to the successor lawyer provided the successor lawyer is willing and able to accept the trust conditions. If the vendor's lawyer is unwilling to transfer the trust conditions to the successor lawyer, then you are still bound to fulfill those conditions.

See *Witten, Vogel, Binder & Lyons v Leung*, 1983 CanLii 1028 (ABQB) [Witten] which explains the basis for the court to require solicitors to comply with trust conditions. Witten was quoted with approval by Mme Justice Beard [as she then was] in *Guay v. Dennehy*, 1994 CanLII 16669 (MB QB) at para 38:

The importance of solicitors complying with trust conditions cannot be overemphasized, and I cannot express that importance any better than was done in the following quote from the case of Witten, Vogel, Binder & Lyons v. Leung (1983), 148 D.L.R. (3d) 418 (Alta. Q.B.), at p. 420 (per McDonald J.):

> *It is of overarching importance to the practice of law as an honourable profession that solicitors comply, without reservation or question, with the trust conditions upon which documents have been entrusted to them by other solicitors. Unless the solicitors who have sent documents to other solicitors on trust conditions can rely with absolute confidence upon those trust conditions being observed, the edifice of trust between solicitors, upon which so much of the efficient service to the public depends, will crumble. It is in the public interest that this confidence be maintained. This concern merits paramountcy over any effect that judicial measures taken to ensure maintenance of that confidence may have upon the legal or equitable rights and obligations of the solicitors' clients or those of other persons. (Emphasis added)*

Beard, J proceeds to outline the law in paragraph 39 of her decision related to enforcing trust conditions:

> *Other considerations relevant to the law as it relates to trust conditions are as follows:*
>
> *1. In proceedings to enforce a trust condition, the applicant is not relying on the law of contract, or tort, but rather on the special relationship between lawyers (see Hoffman & Dorchik v. Agnew, Nykyforuk, Purdy & Davis, [1985] 1 W.W.R. 656 (Sask. Q.B.), at p. 662).*
>
> *2. An undertaking given gratuitously will be enforced even though the lack of consideration may be a defence if considered under the law of contract (see McCarthy Tetrault v. Lawson, Lundell, Lawson & McIntosh (1991), 58 B.C.L.R. (2d) 310 (S.C.), at p. 314*
>
> *3. The court has an inherent jurisdiction to enforce undertakings or trust conditions as part of its responsibility to secure the proper conduct of its officers (see Witten, at p. 423).*
>
> *4. In dealings between law firms under trust conditions, the rights and wrongs of the parties are irrelevant (see Minsos, McLeod & Edwards v. Foster Wedekind (May 10, 1988), (Alta. C.A.) [unreported], at p. 2).[ed. Note – since reported at 1988 ABCA 166]*
>
> *5. The solicitor's obligation to observe trust conditions cannot be shackled by instructions given to the solicitor by the client (see Witten, at p. 421).*
>
> *6. The possibility of claims being made in the future by a stranger to the transaction, even where arising out of the transaction, is not a matter which a court is entitled to take into consideration as a ground for ordering payment into court instead of to the vendor (see Damodaran s/o Raman v. Choe Kuan Him, [1980] A.C. 497 (P.C.), at p. 502).*
>
> *7. The court may, depending on the facts of a particular case, consider evidence extrinsic to the trust conditions themselves to arrive at the correct meaning or interpretation of what the parties understood the undertaking to be (see Eddy Group Ltd. v. Brookes (1991), 102 N.S.R. (2d) 122 (T.D.), at p. 134).*

8. A trust condition can be one of two types:

(i) One concerning the mechanics of completing or closing a transaction;

(ii) The other effecting a fundamental change in the obligations between the parties (see Milburn v. Dueck (1992), 81 Man. R. (2d) 266 [[1992] 6 W.W.R. 497] (C.A.), at p. 269).

9. The law is clear that a solicitor's undertaking may be enforced against him personally, depending on the facts of the case. However, the undertaking must be his personally qua solicitor and must be clear on its terms (see Bank of British Columbia v. M. (1981), 120 D.L.R. (3d) 177 [[1981] 2 W.W.R. 351] (B.C.C.A.), at pp. 180-81).

10. If a lawyer accepts documents under certain trust conditions and then uses the documents, he impliedly undertakes to comply with those trust conditions (see Witten, (supra), at p. 421).

I would agree that if a law firm had accepted a trust condition which was clear and unequivocal, then it should be held to absolute compliance with that trust condition regardless of the rights between the clients or those of any third parties. This is so because the court is enforcing the trust condition as part of its responsibility to secure the proper conduct of its officers.

With respect to a successor lawyer or any other related person seeking information from you about the client, even if you are fired, you are still bound to maintain the client's confidences and cannot disclose them without the client's consent. *The Code of Conduct chapter* 3.7-9(c) specifically refers to giving the client all relevant information and does not include the phrase from *The Code of Conduct chapter* 3.7-9 (b) "deliver to or to the order of the client" [emphasis added]. The client's papers and property can be directed to be delivered to someone for the client; any relevant information in connection with the case or matter can be given to the client, only.

Confidential Information

3.3-1 *A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule.*

If your client gives you relevant information you are bound to keep all information confidential and cannot disclose it to a successor lawyer without the client's consent. The obligation to keep a client's confidences confidential is much broader than the rules in court about privileged information, or the confidentiality associated with settlement negotiations.

Commentary, The Code of Conduct chapter ***3.3-1***

[2] *This rule must be distinguished from the evidentiary rule of lawyer and client privilege … The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.*

[3] *A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.*

Use of Confidential Information

3.3-2 *The lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.*

The lawyer's obligation to keep client information confidential can be abused by an unscrupulous client. Assume the client tells you about doing something in the matter that you think is dishonest but will be hard for the other side to discover. You advise the client that the action is wrong and that you will withdraw if the client persists in that action and the client immediately fires you.

You must not disclose the confidential information learned during that discussion with your client without your client's consent unless the disclosure is permitted or required under *The Code of Conduct chapter* 3.3-3B and 3.3-3.

Permitted Disclosure

3.3-3B *A lawyer may divulge confidential information, but only to the extent necessary: (a) with the express or implied authority of the client concerned; (b) in order to establish or collect a fee; (c) in order to secure legal or ethical advice about the lawyer's proposed conduct; (d) if the lawyer has reasonable grounds for believing that a crime is likely to be committed and believes disclosure could prevent the crime; or (e) if the lawyer has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility.*

Mandatory Disclosure

3.3-3 *When required by law, by order of a tribunal of competent jurisdiction, or pursuant to The Legal Profession Act and the regulations/by-laws/rules thereunder a lawyer must disclose confidential information, but the lawyer must not disclose more information than is required. 3.3-3A A lawyer must disclose confidential information, but only to the extent necessary: (a) if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm; and (b) the lawyer does not reasonably believe that such disclosure will cause harm to the lawyer or to the lawyer's family or to the lawyer's associates.*

e) Client's Funds in Trust Account

If you are discharged or withdraw, you can apply any trust money that you hold on behalf of the client to your outstanding fees and disbursements. If any amount of your client's trust money remains after all the fees and disbursements are paid, you must refund it under the Law Society rules about Financial Accountability.

LSM Rules

> *"**Trust money**" means (a) all money received by a member in connection with his or her legal practice that (i) belongs in whole or in part to a client of the member, or (ii) is received on a client's behalf or to the direction or order of a client; or (b) money received by a member on account of fees for services not yet rendered or on account of disbursements not yet made, or for which a statement of account has not been rendered;*

When making refunds of trust money to clients, remember the rules about refunding cash. If the client pays trust money to you for fees and disbursements, expenses or bail in cash in excess of $7500, you are allowed to accept the cash over $7500 because of the exception in LSM Rule 5-45 (5)(e) for fees, disbursements, expenses or bail. But note that at this writing there are potential amendments being considered regarding this exception for fees, disbursements, expenses or bail so be sure to check the current rules about cash and clients.

Note: When you refund any trust money that was received in cash, the refund must also be in cash.

The rule about refunding cash trust receipts in cash is designed to prevent money-laundering. If a client gives you large sums of money in cash that you deposit to your trust account, there is a possibility that the client is trying to disguise the origins of illegally obtained money. If you pay out the refund by trust cheque, the money in the client's hands will appear to have come from a legitimate source; namely your trust account. By giving a cash refund to the unscrupulous client you have prevented that unscrupulous client from using your trust account to conceal the origins of the cash.

Acknowledgement of cash refund required

5-45(6) *When a member or law firm pays a cash refund under paragraph (e) of subsection (5), the member or law firm must obtain a signed and dated acknowledgement of the payment from the person who receives the refund. promptly render an account for outstanding fees and disbursements;*

Under *LSM Rule* 5-44 (1) (l) you have a general obligation to pay out all trust money "expeditiously" when a matter is concluded and if you are discharged or are withdrawing from a file, the matter is concluded as far as your legal services are concerned.

LSM Rules

Handling of trust money

5-44(1) *A member or law firm must .....*

(l) ensure that trust money is paid out expeditiously once a legal matter is concluded,

...

You cannot make any transfers from your trust account to your general account to pay for your legal services unless you have rendered a statement of account to your client. Rendering an account means you have sent or delivered the account to the client.

LSM Rules

Handling of trust money

5-44(1) *A member or law firm must …*

(c) not withdraw money from a trust bank account to pay for the recovery of the member's or law firm's fees or disbursements unless a statement of account is prepared and sent or delivered to the client at the time the money is withdrawn;

If you are discharged or withdrawing, you should prepare a statement of account for your legal services and disbursements to the date of the discharge or withdrawal. Delay in billing for your legal services will only make collection of any outstanding balance more difficult. You cannot claim a solicitor's lien for unpaid fees and disbursements if you have not rendered an account for those legal services and expenses so you should do that as soon as possible, especially if there is a chance that you might have to claim a solicitor's lien on the file in order to be paid in full.

You must ensure that whatever fee you charge, it meets the test of being fair and reasonable and has been disclosed in a timely fashion as set out in both the *LSM Rules* and *The Code of Conduct*

LSM Rules ***Division 5 - Lawyers' Fees***

Fees, disbursements and interest

5-57 *A member must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.*

The Code of Conduct chapter ***3.6 FEES AND DISBURSEMENTS***

Reasonable Fees and Disbursements

3.6-1 *A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.*

f) Co-operate with the Successor Lawyer

You have a professional obligation to work with the successor lawyer in a reasonable and cooperative way when you are transferring the file whether you have been discharged or you are withdrawing for cause.

3.7-9 *Upon discharge or withdrawal, a lawyer must: …*

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client;

Commentary excerpts

[5] *A lawyer who ceases to act for one or more clients should co-operate with the successor lawyer or lawyers and should seek to avoid any unseemly rivalry, whether real or apparent.*

Cooperating with the successor lawyer to minimize expense includes the obligation on you to pay for the cost of making any copies of material from the file that you want to keep in your office.

Commentary excerpts

[4] *Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.*

g) Notify Relevant Others

3.7-9 *Upon discharge or withdrawal, a lawyer must:*

(g) notify opposing counsel or other interested parties that may need to know;

Refer to the section above on reasonable notice and the section below on complying with rules of court.

Withdrawal from Representation

3.7-1 *Commentary*

[3] *Every effort should be made to ensure that withdrawal will occur at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.*

Other interested parties who need to be notified of your withdrawal from representation might include consultants, experts or other professionals you retained for the client's matter. See Commentary 3 to *The Code of Conduct chapter* 7.1-2 about meeting professional obligations.

Meeting Financial Obligations

7.1-2 *A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.*

Commentary

[3] *If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and e-mail address of the new lawyer.*

h) Comply with Rules of Court

You may also have to comply with other statutory requirements for withdrawal, such as notice provisions set out under Rules 15.02, 15.03, 15.04, 15.05 of the *QB Rules.* Review *R v Cunningham* 2010 SCC 10 about what must be disclosed to the court when making an application to withdraw (discussed above).

3.7-9 *Upon discharge or withdrawal, a lawyer must: …*

(h) comply with the applicable rules of court.

Commentary excerpts

[1] *If an application to court is necessary, the lawyer should take care to ensure that any material filed does not violate solicitor-client privilege.*

I. DUTY OF SUCCESSOR LAWYER

There are obligations on the lawyer who is taking over representation of the client after a previous lawyer has been discharged or withdrawn from representation. The successor lawyer should be sure that the former lawyer is no longer representing a client before entering into a retainer.

Duty of Successor Lawyer

3.7-10 *Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.*

This obligation does not prevent a lawyer from giving independent legal advice or a second opinion on a legal matter for a client who is represented by another lawyer. Where there are court matters pending, and the successor lawyer has confirmed that the client has discharged the former lawyer or the former lawyer has given notice of withdrawing from representation, the successor lawyer might need to file and serve a notice of change of representation on the former lawyer if the lawyer fails to take steps to seek permission to withdraw from the record. The successor lawyer should be mindful of the court rules about permitting change of representation when a trial date has already been set.

Commentary

[1] *It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged.*

Successor lawyers should be alert to their professional obligations not to be made a dupe for a client when accepting a retainer on a matter where the previous lawyer withdrew for good cause or where the client apparently discharged the lawyer without good cause. Justice Alice Woolley, when she was a professor of law, wrote an *interesting article about the dangers facing a successor lawyer* when dealing with an unscrupulous client who discharged a previous lawyer because the lawyer advised the client that the proposed course of action was unethical. The unscrupulous client then retained new counsel without disclosing the earlier advice and omitted the information that would have alerted the successor lawyer to the impropriety of the client's actions.

She states:

> *The problem is, as the Griffiths case illustrates, a client may manipulate the legal obligations that bind lawyers to attain legal services for an unlawful end. Once a client has an opinion that a legal scheme is unlawful it can use the lawyer's duties of confidentiality, and the fact that lawyers are only prohibited from knowingly assisting an unlawful scheme, to switch counsel, confident that the first counsel won't disclose what happened since that lawyer was not duped, and making sure not to disclose information to the new counsel that might preclude his assistance.*
>
> ...
>
> *For the second law firm the answer is to be alert to any indication that its legal services are being used for improper purposes. While that sort of alertness seems unattractive at the time – at best it leads to an uncomfortable conversation with the client, and at worst it leads to the termination of the lawyer-client relationship – it prevents the serious longer term consequence of having to explain the lawyer's role to the police, the courts and the public.*

Ultimately no regulatory scheme can perfectly address or anticipate the ethical challenges and legal risks that the lawyer-client relationship occasionally poses. Individual lawyers and law firms need to remain alert to these sorts of challenges, and respond in ways that meet their ethical duties while minimizing their legal risks.