The Law Society of Manitoba

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RETAINERS

Practice Management

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A. INTRODUCTION

This module describes the nature, purpose and requirements of retainer agreements, contingency fee agreements, joint retainers and limited scope retainers. It also addresses the requirements for giving independent legal advice, and witnessing a signature under *The Real Property Act* for a transfer of land or for a mortgage or loan.

It is important to always confirm the detailed terms of your retainer in writing with your client when you open the file and whenever your client's instructions change.

This module is not exhaustive. It is not a substitute for exercising professional judgment and does not constitute legal advice.

This module was last updated in July 2025.

If you find any information that is unclear, inaccurate or outdated, please send an email with details to *cpd@lawsociety.mb.ca*.

B. ESTABLISHING THE SOLICITOR-CLIENT RELATIONSHIP

When the solicitor-client relationship is created, you enter into a fiduciary position of trust with your client which continues after the end of the retainer, no matter how the relationship ends. Your duty of loyalty to your client is based on that trust.

Your duty of loyalty to the client includes:

- **a duty of commitment to the client's cause**: to pursue your client's rights, keeping their interests ahead of all other interests, and not summarily and unexpectedly withdrawing from representing them;
- **a duty of candour**: to openly share with your client all relevant information in your knowledge; to not keep the client in the dark about matters you know are relevant to the retainer;
- **a duty of confidentiality**: not to use or disclose confidential information concerning the business and affairs of the client acquired in the course of the professional relationship without the client's consent – solicitor-client privilege protects these communications from disclosure;
- **an obligation to avoid conflicting interests**: to not act or continue to act for a client where there is a conflict of interest except as permitted under the *Code of Professional Conduct* (Code).

Whether a solicitor client relationship has been created is a question of fact.

The test to determine whether a solicitor-client relationship exists is "*whether a reasonable person, in the position of a party with knowledge of all the facts, could reasonably form the belief that the lawyer was acting for a particular party.*" (See *Zimak v. 4244354 Manitoba Ltd. et al*.)

Some of the indicia of a solicitor/client relationship are:

- a contract or retainer;
- a file opened by the lawyer;
- meetings or correspondence between the lawyer and the party;
- a bill rendered or paid;
- instructions given by the party;
- the lawyer acting on the instructions;
- legal advice given; and
- legal documents created for the party.

Not all indicia need to be present for the relationship to exist.

Code Rule 1.1-1 defines "client" very broadly to include not only the person you undertake to represent, but also any person who consults you and reasonably concludes that you agreed to render legal services to them.

"Client" includes all clients of the law firm where you work whether or not you personally handle the client's work.

A lawyer-client relationship can be established without formality and even without your intention to establish it. The person who claims you are their lawyer will be found to be a client if they can show that the circumstances are such that they can reasonably have concluded that you agreed and did give them legal services.

The lawyer-client relationship can be created without a written retainer. It is always a question of fact.

Be wary of offering casual advice; that chat you had with the neighbour over her difficulties with her employer and questions about possible remedies might have seemed to be an informal chat to you, but if she shared confidential information with you and you offered advice, a lawyer-client relationship may have been created, which could later put you in a conflict position.

C. RETAINERS DEFINED

1. Retainer means **the act of hiring** a lawyer to provide professional legal services.

A client retains you when they hire you to provide legal services. Whether the person is your client or not is a question of fact and does not depend on having a written retainer, or payment, or the opening of a file. If there is objective evidence demonstrating that the person had a reasonable belief that a lawyer-client relationship was established, they are deemed to be your client.

If you do not intend to provide legal services to a person, there may be a risk the person may not understand your intent. Give them a written non-engagement letter confirming that you are not acting for them and that they should consult another lawyer. You should have a standard non-engagement letter that is ready to use.

2. Retainer means an **amount of money paid** by the client to the lawyer in order to secure the lawyer's legal services (also known as a deposit toward legal fees to be earned).

How much money you will need from a potential client as a money retainer before you will accept and undertake to do their legal work is **a business decision**. The amount you ask for may be based on (for example):

a) your past experience with similar matters;

b) a portion of your estimate of the total costs;

c) the full cost of estimated disbursements if it appears there will be substantial disbursements that need to be paid early on;

d) in some situations where a fixed fee is desired you may want the full fee paid before starting the work; or

e) if all of the legal services will be provided in a very short time (within a month), you may want the full estimated fee paid before you start the work.

Most commonly, the money retainer you receive will only serve as a down payment on the ultimate cost of the legal services you expect to provide. Most lawyers acting on a matter that spans a time longer than a month or two will send interim account invoices to keep the client aware of the costs being incurred, and to request payment for the services as they are rendered.

You may agree with the client that their retainer will remain in trust to be applied to the final statement of account, or request that they refresh the retainer once applied to pay interim invoices, so that there is always some of your client's money in your trust account available to pay for your continuing services.

You are not required to get money from a potential client in order to start providing legal services, but it is a good business decision to do so whenever possible.

Money retainers are paid into your law firm's pooled trust account in trust for your client. You are not permitted to transfer any amount of the client's retainer from your pooled trust account to your general account **until after**:

- you have done the legal work you are billing for, and
- you have prepared and sent the statement of account for services rendered to the client.

3. Retainer means **the document that sets out the terms of engagement** between the lawyer and the client for professional legal services. This is a retainer letter or retainer agreement.

"It is rare for the insurance department to see a retainer letter on a claims file. I don't know if that is because Manitoba lawyers don't use retainer letters or because lawyers who don't, become the subject of insurance claims."

Tana Christianson, Director of Insurance

D. THE RETAINER AGREEMENT

In general, a retainer, retainer letter, or retainer agreement confirms the terms of engagement for your professional services for a client's matter.

A "standard office retainer" is a written document that contains the standard business terms you use with all clients. A "detailed client-specific retainer" is a written document that contains agreed terms that are specific to a client's matter.

The retainer letter sets out the scope of services to be performed, your authority to act and the details of your fee arrangements. It is also evidence of the expectations you and your client will have of each other and should include your law firm's standard business practices.

A retainer is the contract between you and your client. **It is good practice to create a written retainer for every file you open.** By requiring the client to sign the retainer or acknowledge and accept the terms in an email before you open a file or start work, you reduce misunderstandings between you about the legal matter, what is to be done, and how you will be paid.

1. Introducing a Retainer Letter

Once you understand the nature of the potential client's legal problem and have determined that you are interested and competent to take on the file, you should discuss your standard business terms with the potential client. Explain that you will ask them to sign a retainer confirming the agreement between you, if they decide to hire you.

The client needs to understand what it is that you can and cannot do for them if you are retained, the fees you will charge and for what services. Clients are often surprised to learn that you will charge them for every phone call or letter you send or receive.

In your first interview, tell the client what amount of money you will require as a retainer before you will open a file and begin providing any legal services. Describe the first steps you will take on their behalf after you have received the retainer.

You should have one or more standard office retainers prepared that include the basic information related to your firm's business policies and practices that you can quickly access and adapt to a client's situation.

It is good practice for you to create a detailed client-specific retainer which can be attached to the standard office retainer, or you can create a single client specific retainer that includes both the standard and specific terms.

If there are important deadlines or limitation dates related to your client's matter, highlight those in the retainer document and set a deadline by which the client must return the signed retainer along with the money requested so that you are not confronted with a last-minute retainer from a client who procrastinated until the limitation date or deadline is imminent.

Be clear in your interview and in the retainer that you **will not** open a file or begin any legal services for the client until you have the signed retainer and the necessary deposit in your trust account, if that is the agreement you reached. This can prevent an expectation in the potential client's mind that you will start work on the matter immediately following the initial interview.

Clients can sometimes be overwhelmed by the mere visit to a lawyer's office and the volume and detail of information you share. It is a good practice to let the potential client have time on their own to read the retainer, sign it and gather the necessary money retainer. Giving them some time to consider the retainer makes it easier for them to identify any questions they may have. Obviously, you only want clients who are sure that they want to hire you and only on terms that both of you have agreed will apply.

Some lawyers prefer to get a retainer signed on the spot provided the client can pay the requested money retainer immediately, especially in a legal matter where time is limited (e.g., a limitation date, a deadline, a court date or a closing date is imminent).

If a client has an imminent court appearance, be cautious about appearing in court for the client before the retainer is signed and the money retainer has been paid into trust. Once you are on the record, if the client doesn't pay you and you are then unwilling to represent the client, you may be required to bring a motion to withdraw, which the court may deny.

You will reduce client-lawyer misunderstandings by using a standard and client-specific retainer and always insisting on getting it signed and returned to you with the money retainer before starting work. Each of you may refer back to the retainer agreement and rely on it if there are any issues about what you have agreed to do for the client or what obligations the client has to meet.

2. Contents of Your Retainer

As **you** are drafting the retainer agreement, contract law provides that any ambiguities will be interpreted against the drafter, i.e. in favour of the client.

A standard office retainer might include:

a) Information about your client including their proper legal name, whether the client is an individual or a corporation or other entity and if so, the name of the person authorized to give instructions on its behalf.

b) A statement confirming your authority to act on the client's behalf when dealing with third parties within the scope of your retainer (e.g., experts, doctors, witnesses, partners, businesses, the other side or their lawyer).

c) Information about lawyer-client confidentiality and the steps you take to keep the client's information private.

d) Your expectations of clients regarding communication (e.g., client will respond to your requests, and provide supplementary documents or information as needed in a timely manner).

e) Your standard practice regarding communications in your office (e.g., others who can handle some calls or emails); when and how you send updates and reports to the client, returning calls and emails; boundaries (e.g., no weekend calls unless a true emergency).

f) A statement that you are not retained and will not do any work for the potential client until the retainer is signed and returned to you (with any specific money retainer as agreed).

g) A deadline for return of the signed retainer with the money retainer, after which you will assume the client will not be retaining you. This avoids the possibility that the potential client complies months or years later, by which time the terms of your retainer may have changed, or you may be unwilling or unable to represent them. Be cautious about conversations with clients who call you again to discuss matters while promising to send the retainer "soon", and send a non-engagement letter when it is clear you are not acting. See the section on non-engagement letters below.

h) What fees will be charged in relation to services provided by paralegals, articled students or other lawyers who may work on the file.

i) General examples of what legal services will be included in the billing (e.g., all calls, all emails, research, review of documents, meetings, waiting time at court, missed appointments).

j) Your business policies related to billing for services and disbursements, and how the client is expected to pay (e.g., frequency of billing, future increases of hourly rates with advance specified period of notice, what are disbursements, tax deductible items, GST issues, interest on outstanding accounts, whether you accept credit cards, your requirement that the client refresh the retainer after each interim billing and how that can be done, or whether the retainer will remain in trust to be applied to the final statement of account or a fixed fee to be paid in full).

k) How the lawyer-client relationship may be terminated by either of you and what will happen to the file and documents if the relationship ends before the matter is complete.

Some examples of the details that a client-specific retainer might include:

- The information provided by the client upon which you are basing your legal advice;
- A note that your advice may be different if the facts turn out to be different than those given by the client;
- A warning reminder of any limitation periods, notice requirements, or deadlines which may affect your client's legal rights;
- What the client wants and values for outcomes;
- The specific legal services you are agreeing to provide (this is essential if the retainer is a limited scope retainer agreement – see Limited Scope Retainers below);
- An estimated time line for dealing with the legal matter, if possible;
- Any other documents or information from the client you will require in order to open a file and start work;
- When you will start work and the steps you will take once you do. If it's hard to foresee the steps in the file, then set out the first stage. For example, "We will do some preliminary investigation and then consult with you before proceeding further."
- An estimate of the total cost, if given.

Your retainer should include reminders of any imminent deadlines or limitation dates discussed in the interview that might be affected by the client's delay in responding or retaining you or another lawyer.

When drafting any retainer, keep in mind that it should be clear and easy to understand, and flexible enough to account for the particulars of the client's situation. Any ambiguity will be construed against you. See the Appendix for sample retainer letters that you can adapt to your client's situation using your own professional judgement.

E. NON-ENGAGEMENT LETTERS

If, after an interview, you don't want to represent a potential client, don't feel competent to do so, or if the client has not yet decided whether they will retain you, it is wise to send a non-engagement letter or email.

In the interview, the prospective client likely would have shared information and details about their matter, and you may have given some initial impressions. The prospective client may feel you have given them an opinion or some advice on next steps. If they follow what they perceive to have been your legal advice unsuccessfully, they may make a complaint against you.

The purpose of a non-engagement letter is to dispel any notion of the prospective client that you have agreed to act. A non-engagement letter should make it clear that you are not acting for the prospective client and you did not provide legal advice. It could set out that the client gave you basic information about their matter which may be incomplete, and that any initial impressions you may have provided were comments general in nature and not legal advice upon which they can rely.

Non-engagement letters **should <u>not</u> include an opinion** regarding the merits of the matter. It is important to include the information that there may be limitation dates pending and to recommend that the client take immediate steps to consult another lawyer about any deadlines or notice requirements that might affect their legal rights.

Sending a non-engagement email or letter is not necessary in every situation where you decline to act, but sending one is worthwhile to ensure the prospective client understands that you are not going to provide any legal services and will not take any steps in the matter on their behalf.

If you have given the prospective client the retainer letter to consider, and sign and return with the money retainer, and they have not done so by the deadline set out, you may also wish to send a non-engagement letter.

You can keep all non-engagement letters or emails in a master non-engagement folder as a record for yourself.

Sample non-engagement letters can be found in the Appendix.

> If there's even **a chance** that the potential client might think you are going to do something for them when you are not going to act, **send out a** non-engagement letter and **dispel all doubt!**

F. CONTINGENCY FEE AGREEMENTS

There are special rules for Contingency Fee Agreements.

1. What is a Contingency Fee Contract or Agreement?

"Contingency contract" is defined in section 55(1) of *The Legal Profession Act of Manitoba* (the *Act*) as:

> *… a contract between a member and a person (referred to in this section as "the client") under which the member is to receive or retain, as remuneration for services rendered or to be rendered to the client, in lieu of or in addition to other remuneration for those services,*
>
> *(a) a portion of the proceeds of the subject matter of the action or proceedings in which the member is or will be acting for the client;*
>
> *(b) a portion of the money or property in respect of which the member is or may be retained or employed; or*
>
> *(c) a commission or a percentage of:*
>
> *(i) the amount recovered or defended, or*
>
> *(ii) the value of the property that is the subject of a transaction, action, or proceeding.*

2. Matters Appropriate for a Contingency Fee Agreement

You might enter into contingency fee agreements with clients who do not have access to funds or the ability give you a money retainer at the beginning of the matter or are unable to pay your fees until some money for the claim is recovered by your legal services.

If you expect that the client will recover some money at the end of the matter you may be willing to wait for that recovery before you are paid for your services. Because of the situation, you might agree to take a percentage of the settlement/damages (or the costs awarded) as your fee instead of an hourly fee. The amount of your fee would then be contingent on the size of the settlement or damages awarded, or the costs in the matter.

You can enter into a contingency contract with a client whether or not an action or proceeding has been commenced or is contemplated (see s. 55(2)).

Contingency agreements in Manitoba are most often used in personal injury matters where no motor vehicle is involved (e.g., slip and fall). However, contingency agreements can be used for any legal matter provided you and the client agree on the terms, the terms are fair and reasonable to the client, and you follow the Code and *Act* rules relating to such agreements.

3. Contents of a Valid Contingency Fee Agreement

It is important that you identify, consider and address the issues that can arise in a contingency fee agreement before you create it. Craft an agreement that addresses such matters as:

- Are disbursements to be billed and paid as they are incurred or only out of the final recovery?
- Under what circumstances are you permitted to withdraw from representation before the matter is completed?
- If the client ends your retainer before the matter is done, will you still be paid for legal services rendered to that date, and if so, how?

In Manitoba, there is no prescribed wording that must be included in a contingency fee agreement, but there are special provisions in the Code about when and how you may withdraw from representation when a contingency fee agreement is involved. There are also special limitations regarding solicitor's liens and your collection of outstanding fees and disbursements.

If enforcing your solicitor's lien against the client's property in your possession would materially prejudice the client in an uncompleted matter, you are not permitted to assert it (**Code Rule 3.6-13**). If the client is willing to enter into a new agreement to pay your fees where you are reasonably assured of being paid "in due course", you are not permitted to enforce your lien for non-payment.

If you withdraw without just cause before the client's matter is completed, you lose your solicitor's lien over the client's documents.

If the client chooses to discharge you, you may release the file to the new lawyer on their undertaking to pay your fees for work you performed to date out of the eventual settlement or award in the case. You must acknowledge that the client retains the right to have your account assessed. Under the Code provisions about solicitor's liens, you cannot insist on payment unless you have a provision in the contingency agreement allowing you to do so.

Unless the contingency fee agreement addresses such issues directly and provides for a different arrangement, you will be bound to follow the rules set out in the Code. Remember, all terms in the contingency fee agreement must be fair and reasonable to the client to be enforceable.

4. Steps When Entering into a Contingency Agreement

When you are entering into a contingency fee agreement you must give the client both a copy of the contingency fee agreement in writing AND a copy of subsections 55(5) and 55(7) from Division 5 of *The Legal Profession Act*. Failure to do so means you are not entitled to "any remuneration exceeding that to which [you] would have been entitled without the contingency contract" (see s. 55(4)).

5. Fees in a Contingency Fee Agreement

In Manitoba, there is no prescribed limit to the size of the percentage of the award or settlement that you can charge under a contingency fee agreement, but like all fee agreements, the ultimate fee must be fair and reasonable to the client.

You must always render a final account to your client before you collect payment under the contingency agreement, although you may collect payment of any final account over time.

A client may apply to the Court of King's Bench for a declaration that the contract is not fair and reasonable at any time within 6 months after the payment provided for in the contingency contract is paid to or retained by you (see s. 55(5)). That means that the client's right to complain about the fee in the contingency fee agreement does not end with the payment of the statement of account and closing of the file.

The judge, who can hear the application orally or by affidavit, **must** declare the contingency contract **void** if the judge is satisfied that the contingency contract is not fair and reasonable to the client (see s. 55(7)).

If the contingency fee agreement is void, the judge must order that your accounts for legal services and disbursements be taxed as if no contingency contract had been made. If it turns out that you have received or retained more than the taxed amount, the court must order repayment of the excess to the client.

It is good practice to keep a record of the time spent and details of the legal services rendered even if you have entered into a contingency agreement in case you are ever required to justify a fee. Even if you have included a provision in your contingency agreement that permits you to be paid a reasonable fee if you are discharged before the end of the legal matter, you can be in a difficult position if you have kept little to no record of the work you did on the file and the time spent. If there is a taxation, failure to have detailed records makes it more difficult to prove the full amount of your claim.

6. Ending the Relationship under a Contingency Fee Agreement

Code Rule 3.6-2 Commentary [2] provides that you cannot withdraw from representing your client on a contingency agreement except in the circumstances set out in **Code Rule 3.7-7** Obligatory Withdrawal, or the contingency agreement sets out your right to withdraw and the applicable circumstances.

That means that you are only permitted to withdraw from a contingency fee agreement if:

- the client discharges you, or
- the client persists in instructing you to act contrary to professional ethics, or
- you are no longer competent to continue to handle the client's matter

unless the written contingency contract between you and your client specifically states otherwise and sets out the circumstances under which you may withdraw.

Just like any other time you withdraw, **Code Rule 3.7-8** requires that you try to minimize expense and avoid prejudice to the client and do all that can reasonably be done to help ensure the orderly transfer of the matter to the client's new lawyer, or directly to the client if they will self-represent.

The general Code rules about Withdrawal from Representation are set out in section 3.7 and apply to both your withdrawal or your discharge from a contingency agreement prior to its completion.

The rules require you to give your client written notice of the fact and the reasons for your withdrawal, to deliver the client's papers and property to them, account for all the client's funds, render a final account, notify any other lawyer or party that needs to know and give the client all relevant information in connection with the matter. Your professional obligations include cooperating with subsequent counsel and complying with any applicable rules of court.

7. Contingency Fee Agreements Summary

A contingency fee agreement provides that your fee is contingent on the outcome of the client's matter.

Don't enter into contingency agreements lightly. There are mandatory rules to follow and specific content that should be included in a contingency fee agreement. See the *Code of Professional Conduct* and section 55 of *The Legal Profession Act*.

A client who enters into a contingency fee agreement can apply to court, at any time up to 6 months after the fee is paid or retained, for a declaration that the contract is not fair and reasonable. If it is not, the Court must declare the agreement void, and send your account to taxation before the Associate Judge.

Keep accurate records of your time and activities even though you are being paid under a contingency fee agreement because if the contingency agreement is later found to be void or you withdraw or are discharged by your client before the matter is completed, you will need a record of the legal services you have provided in order to seek payment.

G. JOINT RETAINER AGREEMENTS

1. Joint Retainers in General

Although you usually represent only one client on a legal matter, in some circumstances, you might be asked to enter into a retainer agreement to represent more than one client in a single retainer. A joint retainer means that you are retained by all of those clients to act on the same matter at the same time and there is no lawyer-client confidentiality among the clients with respect to information from any one of them to you.

> You can only accept such a request if the clients agree you may act for them on a joint retainer, and when their interests are not in conflict.

The joint retainer agreement must be in writing and Code Rule 3.4-5 requires that you advise all the clients that:

- you have been asked to act for both or all of them;
- no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- 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.

Code Rule 3.4-7 contemplates that some clients will want you to act for them on a joint retainer even where there is a potential for conflicting interests to arise. Fully informed clients can consent and accept the risks. If you have advised the clients of the potential for conflict but the clients still want you to represent them on a joint retainer, you can accept the joint retainer if each client consents in writing or you confirm their consent in a separate written communication to each client before acting on the joint retainer.

If a contentious issue does arise between/among your joint retainer clients you must not advise them on the contentious issue and must refer them to other lawyers. You are permitted to inform them of their option to settle the issue between themselves by direct negotiation **if no legal advice is involved and the clients are sophisticated.** You must withdraw from the joint retainer if the contentious issue is not resolved by the clients themselves (see **Code Rules 3.4-5 (c)** and **3.4-8 (b)**).

If they are dealing with the contentious matter on their own, you can advise them on non-contentious matters, but be very careful. If they can resolve the contentious issue without

your involvement you may continue to act for all parties on the joint retainer (see **Code Rule 3.4-8**).

When one of the clients is less sophisticated or more vulnerable than the other or others, you should recommend that the client get independent legal advice before consenting to a joint retainer (see the Commentary to **Code Rule 3.4-5**).

2. Wills Instructions from Spouses or Partners

If you accept Wills Instructions from spouses or partners to prepare Wills based on their shared understanding of what is going to be in each other's Will, you must treat the matter as if it is a joint retainer. Before you draft the Wills, you must advise the spouses or partners that:

- you have been asked to act for both of them to prepare the Wills and you will only do so on a joint retainer;
- a joint retainer means that no information received from one of them in connection with the instructions and preparation and signing of the Wills can be treated as confidential so far as the other is concerned, so you will share all information with both of them that either of them shares with you; and
- if a conflict about the matter develops that cannot be resolved, you cannot continue to act for both of them and you may have to withdraw completely and send them to hire separate lawyers.

Those are the same obligations that you have under **Code Rule 3.4-5** whenever you accept a joint retainer.

However, when representing spouses or partners on a joint retainer for taking instructions to prepare Wills, **you have an additional obligation** to advise them at the outset that, if some time after you take their instructions under the joint retainer, only one of them contacts you with new instructions to change or revoke a Will you have specific ethical obligations:

- you will treat the subsequent communication as a request for a new retainer about drafting a Will and not as part of this joint retainer between them;
- you will not disclose this subsequent communication to the other spouse or partner because you are obliged to hold the communication about the request for a new retainer in strict confidence in accordance with Rule 3.3-1; and
- you will not act for the person on the new retainer, unless before the request for the new retainer:

- the spouses or partners annulled their marriage, divorced or permanently ended their conjugal relationship or their close personal relationship; or
- the other spouse or partner died; or
- the other spouse or partner was informed of the subsequent communication about a new retainer (with the permission of the partner or spouse seeking it) and the other spouse or partner agreed, in writing, to you acting on the new instructions.

The other spouse or partner is now your former client and therefore must consent in writing before you can act on the new retainer that will affect the past legal work you did.

After you have informed the spouses or partners of these restrictions and before you can prepare their Wills, you must get their written consent to the joint retainer or confirm their consent in a separate written communication to each of them (see **Code Rule 3.4-5 Commentaries [2] and [3]**).

3. Acting for Borrowers and Lenders

a) The General Rule

Generally, you must not act for both the lender and the borrower in a mortgage or loan transaction.

> ***3.4-12*** *Subject to Rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.*

The borrower and the lender on a mortgage or loan transaction are considered to be on opposite sides of the transaction. Their interests are not the same, and on some issues, may become adverse.

For example, assume you agreed to act for both Borrower B and private Lender L. If Client B agreed to borrow money from Client L at a borderline criminal rate of interest, your duty of candour to Client B requires you to tell them that the rate of interest is close to that borderline and advise them that they should investigate other possible lenders. But your duty of commitment (not to act against your client's interests) would prevent you from speaking against Client L's interest as the lender. Your professional duties of loyalty to the two clients are in conflict.

b) Exception to the Prohibition on Acting for Both a Lender and a Borrower

The exceptions to this prohibition are set out in **Code Rule 3.4-14**. You are permitted to act for both lenders and borrowers:

- where the lender is a "lending client", or
- where the lender is selling real property to the borrower and the mortgage which is the subject of the transaction is part of the purchase price, or
- where you are practicing in a remote location where a person could not conveniently retain another lawyer for a borrower-lender situation, or
- where the lender and borrower are not at arm's length from each other as defined in the *Income Tax Act* (Canada).

In **Code Rules 3.4-14** to **3.4-16** dealing with acting for borrowers and lenders, the term "lending client" is defined by **Code Rule 3.4-13** as *… a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.*

If you meet an exception in **Code Rule 3.4-14**, and you decide you will act for more than one client in the borrower and lender situation, you are permitted to do so but only if the borrow and lender retain you on a joint retainer.

c) Disclosure to Borrower and Lender on Joint Retainer

All material information that is relevant to the transaction must be disclosed to both the borrower and the lender in a mortgage or loan transaction when you are acting for both sides whether the parties ask for it or not, BEFORE you advance or release the mortgage or loan funds. Material information is any fact that objectively would be seen as relevant by any reasonable borrower or lender (see the Commentary to **Code Rule 3.4-15)**.

An example of information that would be material:

> ***Commentary***
> ***[1]*** *… An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. ….*

As another example, if the borrower has a private loan separate from the loan or mortgage arranged with the lender in the transaction, you would be bound to disclose that to the lender and could not keep that confidential for the borrower. It might have an impact on whether the lender proceeds with the loan, and objectively, that makes it material information and must be disclosed to both the lender and the borrower.

d) Implied Consent of Lending Clients with Written Instructions

Code Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process around joint retainers when you are dealing with "lending clients". The practice in Manitoba is that lending clients will send you their written instructions if you are the lawyer acting for the borrower.

Unless the lending client requires that its consent be reduced to writing, if you receive written instructions from a lending client to act on the borrower's loan, the lending client is deemed under **Code Rule 3.4-16** to consent to being on a joint retainer with the borrower. The deemed consent to a joint retainer applies to all loans when you are acting jointly for both the lending client and another client regardless of the purpose of the loan, including mortgage loans, business loans and personal loans. It also applies where there is a guarantee of a loan.

You do not have to explain the rules about joint retainers to the lending client or seek their separate written consent to the joint retainer.

You must still explain the rules and restrictions relating to joint retainers to the borrower, and still require the borrower's written consent or your confirmation of their consent by written communication to them.

e) Acting for the Buyer, the Seller and the Lender on a Residential Transaction

> Generally, it is not a good idea for you to act for the buyer, the seller and the lender on a real estate transaction.

Some lawyers who act on residential real estate transactions in Manitoba have entered into a joint retainer for all parties to a residential purchase and sale, representing the buyer and the seller and the mortgagee, all on a joint retainer. Acting for a seller AND a buyer AND a lender is NOT recommended because acting for all of them is fraught with risk.

This breaks both the general rule against acting for parties who are adverse in interest and the general rule against acting for borrowers and lenders. It can be done in the rare case where the deal does not have any controversial terms and only if you are extremely careful.

You may act for the buyer and seller and lender on a real estate transaction ONLY if you comply with **all** the following Code rules:

- Tell the buyer and the seller (and the mortgagee) that you have been asked to act for all of them; and

- Tell the buyer and the seller and the lender that you can only represent all of them on a joint retainer (see **Code Rule 3.4-5**); BUT NOTE that you cannot enter into a joint retainer with the borrower and the lender unless one of the exceptions to the prohibition against acting for both of them applies (see **Rule 3.4-14** discussed above); and

- Tell all of them, preferably in writing, that under the joint retainer, you will not treat any information you receive from any of them as confidential from the others—your knowledge will be shared with all of them and in relation to relevant information, they will be treated as if they were one client (see **Code Rule 3.4-5(b)**); and

- Tell all of them that if a conflict or contentious issue develops that cannot be resolved by them without your involvement, you cannot continue to act for them under the joint retainer and will have to withdraw completely and they will have to retain their own lawyers (see **Code Rules 3.4-5(c) and 3.4-8**); and

- If you have a continuing relationship and regularly act for one of the proposed parties to the joint retainer, tell all of them about the continuing relationship and recommend that the others get independent legal advice about whether to enter into a joint retainer (see **Code Rule 3.4-6**); and

- If you want to be able to act for one of the parties to the joint retainer in this matter even if a contentious issue arises that the parties cannot resolve themselves, you must disclose that fact and ask all parties if they will consent to you representing only one of them if you must withdraw from the joint retainer. They are not required to agree to this in order for you to accept a joint retainer. There is no guarantee that such prior consent will be binding on them if the contentious issue that arises was not specifically contemplated (see **Code Rule 3.4-9**); and

- If they are all still willing to have you represent them on the joint retainer under these conditions, you must obtain their written consent to represent them on the joint retainer or you must confirm their consent by separate written communication to each of them prior to acting (see **Code Rule 3.4-7**).

H. LIMITED SCOPE RETAINERS

Limited scope retainers, limited service retainers or unbundled legal service agreements (terms used interchangeably) are written agreements between you and a client, used when the client retains you to perform only some of the legal services that would normally be required in a full service retainer for their legal matter, and the client maintains responsibility for performing the remainder of the tasks.

Limited scope retainers are different from summary advice that might be given in a pro bono legal clinic or as duty counsel (see **Code Rule 3.1-2 Commentary [7B], 3.2-1A Commentary [5] and 3.4-2D**).

Limited scope retainers are becoming more common as more people represent themselves. They are useful for clients who cannot afford or do not want full service legal representation, but can benefit from and want some limited legal help. Some clients simply want to maintain control of their legal matter, and want to consult with you only as needed, or retain you for only a specialized legal service, while they handle the balance of the matter on their own.

While not every legal problem is appropriate, there are many opportunities for limited scope retainers. They can be used to provide a variety of services to those who might otherwise have no legal advice. Some competent legal advice is better than none at all in many circumstances.

The ongoing research of the National Self-Represented Litigant Project in Ontario, and the August 2018 report of the Alberta Limited Legal Service Project found that there was a high level of client satisfaction with legal services obtained under limited scope retainers provided a client is fully informed about what is and is not covered by the limited scope retainer and the fees are fully disclosed.

> *A follow-up study on the Alberta pilot by John-Paul Boyd for the Canadian Research Institute for Law and the Family found that 87.6 per cent of clients were satisfied or very satisfied with the coaching and unbundled services their lawyers provided. The model was good for lawyers as well. "In terms of the lawyers' experiences with unbundling, the report found 91.7 per cent of lawyers in the project were strongly satisfied or satisfied with providing unbundled services." Ninety per cent indicated they would continue to offer coaching and unbundled services.*

The Law Society encourages you to offer limited scope retainers in appropriate circumstances provided you use a written limited scope retainer that is clear about the exact scope of the legal services that will and will not be provided to the client.

1. Limited Scope Retainer Defined

> *The formal term used by most rules of Professional Conduct is "limited scope retainer". The idea of "unbundling" one's services is a more visual way of conveying the same meaning - if full representation is a "complete bundle" or package of legal services, then "unbundling" extracts one of more of those services and offers them separately.*
>
> *"Legal coaching" is an expression developed and promoted by the NSRLP, and flows directly from the data collected from self-represented litigants in the 2013 National Self-Represented Litigants Study which we use to describe the type of assistance that requires a client to do much of their own work, while the lawyer provides "coaching" [which can include] guidance, information, strategic counsel, feedback and review.*
>
> (from the *National Self Represented Litigants Project* (NSRLP))

A limited scope retainer can mean you do a discrete task in the legal matter for the client, or it can mean that you will represent the client on one or more specific issues in the matter, or you may work in the background as a legal coach for the client. The client will handle all the other matters that would normally be legal services that a lawyer would provide in a traditional full service representation.

If you have enough knowledge about the legal matter on which the client is consulting you so that you are competent to represent the client, and you have enough experience with similar matters so that you can both anticipate and warn the client about common issues that may arise outside of the limited scope of the retainer, consider offering your services for only a part of the legal matter on a limited scope retainer if a client is unable to afford or does not want a full service retainer.

2. Providing Legal Services Under a Limited Scope Retainer

If you are going to act for a client on a limited scope retainer, you must confirm the scope of the legal services that you **will provide** on the limited scope retainer **in writing** in accordance with the Code.

Code Rule 3.2-1A and **Commentaries [1] and [2]** require that you advise the client of the "nature, extent and scope of services" you CAN provide on this client's legal matter. If you then contrast it with the nature, extent and scope of legal services you WILL provide on the limited scope retainer, a client is more likely to understand that the legal services you will provide on the limited scope retainer are only a portion of the legal work that could/should be done on the legal matter.

It is very important that you ensure that the client understands the limits of the limited scope retainer, and understands that they will bear all the responsibility for doing all the other work on the legal matter outside of the limited work you are retained to do.

Insist on having the limited service retainer signed by both you and the client BEFORE you start work on the matter.

DO NOT exceed the scope of the limited scope retainer. If the client wants you to do more, create a NEW written Limited Scope Retainer agreement to prevent misunderstandings about what services the client is retaining you to do.

Remember that any ambiguity in the terms of the limited scope retainer agreement you draft will be construed in favour of the client. **Be clear.**

When appearing on a limited scope retainer, you 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 (see **Code Rule 3.2-1A Commentary [3]** and **KB Rule 15.01.1(1)**). It is also a good idea for the lawyer to remind the court that they are on a limited retainer when they appear.

Consider also how to manage communications with the other side. If you don't want the other lawyer contacting your client directly without your consent, you must give them notice that approaching, communicating or dealing with the person directly falls within your LSR representation agreement (see **Code Rule 3.2-1A Commentary [4]** and **7.2-6A**).

a) Examples of Limited Scope Services

- Provide an initial consultation for information and preliminary advice about legal rights and obligations in a matter.
- Evaluate the merits of a matter at a point in time and provide legal advice based on the limited knowledge of the facts provided. Include the fact basis for your legal advice and a warning that advice can change if the facts are different.
- Consultation for advice and information about the procedure in a court matter or specific court rules.
- Draft (ghost-write) pleadings or affidavits to be filed by the client. Do not include your firm name on pleadings in that situation **unless you are retained**

to file the pleadings. A client could change the documents you draft before filing them in court.

- Draft or assist client to draft documents (e.g., contracts, court orders).
- Conduct an examination for discovery, or prepare and coach the client on doing so.
- Do legal research on the relevant law and produce a legal opinion with advice.
- Prepare the client to attend and argue a legal matter before a court or tribunal.
- Represent a client in the argument of a motion only.
- Represent a client in a bail application only.
- Prepare a checklist of the tasks to be completed in a small claims action.
- Complete one or more transactional steps in a matter.
- Review the facts presented by a client and help the client identify the legal issues and the client's priorities in advance of a negotiation or mediation where the client will attend alone.
- Review and offer advice on documents prepared by the client (e.g., holograph wills, separation agreements, documents for probating a Will, offer to purchase a business).
- Provide independent legal advice on a contract.
- Assist a client in filling out legal forms or complete them for the client to use.

The *NSRLP website* offers additional suggestions of legal coaching services that could be offered on a limited scope retainer, and provides detailed descriptions.

You will realize that many of the legal tasks that must be done on a file are tasks that lend themselves to a limited scope retainer. Be careful to ensure the client is fully informed in writing and understands what the limits of the services mean in relation to the whole legal problem. You must also be satisfied that you can competently represent the client's interests by doing only a part of the legal services.

b) You May Already Provide Limited Scope Legal Services

You may not instantly recognize that some of the legal services you have been offering are actually limited scope legal services, and so you might not have been entering into a written limited scope retainer with your client for those services.

Both you and the client are better protected if you use a **written** limited scope retainer agreement to prevent misunderstandings and to protect you from claims that you did not provide competent legal services. **Code Rule 3.2-1A** requires that the terms of a limited scope retainer must identify the legal services that will be provided and that these terms must be confirmed in writing to the client.

c) Deciding if a Limited Scope Retainer is Suitable

1. Your Own Experience and Knowledge

You have the same professional obligations to be competent and ethical on a Limited Scope Retainer as you would have on a full service retainer (see **Code Rule 3.1-2 Commentaries [5] and [7A]**). If you would not be competent to represent the client on a full service retainer in the matter, do not accept a Limited Scope Retainer.

See **Code Rule 3.2-1 Quality of Service Commentaries [5] and [6]** which set out examples of expected practices.

2. The Client

Think about the ability, cooperation and understanding displayed by the potential client. If the client appears not to understand and accept that the legal services you will provide are only a part of what must be done in the matter and that the client must do the rest without your assistance, do not enter into a Limited Scope Retainer.

Consider these important questions from *The Nuts & Bolts of Unbundling*:

Does the potential client:

- **appear to understand that your services will be limited to those you both identify and delineate in the retainer?**
- **appear to have accepted that they must undertake the remainder of the necessary work themselves?**
- appear to be realistic about the amount of time and work that remains for them to manage in order for them to successfully self-represent?
- have friends and family who will support them, or some other support network?
- appear to be willing to spend sufficient time (and money) briefing you on any work they may have already done?
- appear to be able to handle a matter of its complexity and difficultly, as a person without legal training?

If you have any doubts about any of these issues, don't enter into a limited scope retainer.

3. The Legal Matter Itself

Think about the complexity and breadth of the legal matter.

There are many ways to help a client without taking control of the entire matter. Consider your own checklists of tasks for a legal matter and identify many that could stand alone and still give value to a client.

If the scope of the limited legal services requested is too narrow for you to be confident that you can give competent legal service, do not accept a limited scope retainer.

> Even where your representation is limited to particular tasks, you may still owe a duty to alert the client to legal problems outside the scope of your representation that are reasonably apparent and that may require legal assistance.

Therefore, you should inform the client, both orally and in writing, not only of the limitation of your representation, but also of the possible need for other counsel regarding issues you have not agreed to handle. See LAWPRO's *Best Practices Tip Sheet on Limited Scope Representation*.

For example:

- "You should seek some tax advice, because I haven't reviewed this for any tax issues";
- The need for further pleadings in the near future: "I drafted the statement of claim, but the statement of defence should be reviewed by a lawyer in case you need to file further documents in court after you see it";
- The consequences of missing a deadline if you are not retained to meet it: "I drafted the statement of defence but you must pay and file it at the court office before the date of [date] to protect your legal rights or the plaintiff may be able to go ahead without your input".

d) Risks in Providing Services Under a Limited Scope Retainer

PracticePro notes that the main risks you face in limited scope retainers involve:

- Failing to alert clients to the consequences and/or risks in limiting your legal services to only a certain part of the legal matter.
- Accepting a limited scope retainer where the limits imposed by the client were unreasonable because the matter was too complex (e.g., hiring you to explain the legal terms of a specific contract but not permitting you to spend time to investigate tax or insurance issues that would affect the interpretation of the terms).
- Failing to be clear about which matters the client must complete (e.g., accepting a limited scope retainer to draft a statement of defence but not being clear that the client is responsible to file that defence in court within a certain deadline).
- Failing to clearly qualify your legal advice as being dependent on the specific facts and documents provided by the client and failing to warn that the advice could be different if the facts are different or if the client has not provided information or documents that could affect your opinion.
- Drafting documents for the client in language that the client cannot understand.

Most of the risks can be managed by consciously assessing whether the part of the legal matter that the client wants you to handle is appropriate for a limited scope retainer. The rest of the risks can be managed by using a clearly written limited scope retainer.

It will be helpful to use a prepared standard written limited scope retainer chart or checklist for a particular area of practice and review it with the client when agreeing to act on a limited scope retainer. Mark the items you will do and cross off the items you will not do. Even if you don't get it signed, keep the original checklist in the file and give a photocopy to the client so that the client can clearly see what other matters will have to be handled by the client alone or on a separate retainer with you or another lawyer.

1. Negligence Claims or Complaints in Limited Scope Retainers

The NSRLP research indicates that there is no evidence that unbundled services generate more complaints to the regulators. At present, no law society tracks this data, but NSRLP efforts to determine this suggest that unbundling actually generates fewer not more complaints. (Read more *here* and *here*.)

Limited scope representation: With the right safeguards, possibilities abound discusses the risks of claims:

> *First, communication-related claims, which are the highest source of claims in virtually all areas of law typically happen[s] when there is a disagreement between what the lawyer and client have agreed to do. Was work promised but not done? Did the lawyer take steps to which the client never consented? A limited scope retainer that fails to draw the lines clearly – or fails to follow the lines drawn – can lead to a malpractice claim.*
>
> *Second, limited scope representation presents a risk that lawyers may not dig deep enough and ask appropriate questions on a matter. The failure to undertake adequate investigation is another leading cause of claims. In the context where only some legal work is provided, it may be tempting to cut short a client interview once the paid-for time has run out. If the lawyer discovers any impending deadlines or limitation periods, they should be disclosed and, preferably, confirmed in writing. The interview with the client must be done as carefully as it would be for a client with full representation. If not, remember that lawyers who fail to warn their clients of material legal issues or claims, even where they were not part of the limited scope retainer, have been held liable for malpractice.*

Clear communication and confirmation of all details in writing don't take much effort and will document your file and educate your clients in ways which substantially increase the likelihood of a satisfactory relationship for each of you.

e) Guarding Against Malpractice Claims

Limited Scope Representation Resources provide the following tips to help avoid malpractice claims:

1. Use checklists.

These document who is going to do what before the next meeting. Give a copy to the client. Tailor checklists to your specific practice, fill them out while the client is present, and make sure that you and your client each have an initialed copy.

2. Create a support group of experienced colleagues.

Limited experience with handling limited scope representation poses special challenges for lawyers new to a particular practice area. Colleagues who are

experienced with offering limited scope representation can confirm your analysis, suggest additional issues to explore or divert you from a particular proposed course of action.

3. Practise defensively and document all decisions.

This is good advice in any type of legal work. It is particularly essential to document the instances in which you offer advice on a particular path for the self-represented litigant to take.

4. WRITE IT DOWN.

Memorialize any changes in the scope of your limited representation as they occur. **Never** do work outside the scope of the original retainer without a new retainer signed by the client. Checklists that are attached to the fee agreement are a simple and reliable way to do this. A confirming letter that the client doesn't sign will probably be insufficient to effectively document the new limit in scope. Be sure that you and the client both sign off on any changes.

5. Use prepared handouts.

You may already have prepared handouts on common questions which arise in your practice. It is helpful to have one which describes limited scope representation and details the specific options available. Note on your intake sheet which handouts you gave to the client and on what date. A sample client handout on limited scope representation is found at *practicepro.ca.*

6. Making non-client laypersons part of your team is hazardous.

Limited scope representation may create an informal feeling to the lawyer-client relationship. Despite the apparent informality, this is a lawyer-client relationship. It is between you and your client, not you, your client, Aunt Mary, and others the client may want to have involved. Allowing third parties to participate may destroy the lawyer-client privilege. If the client insists on including non-clients, clearly advise them in advance and in writing, of the risks involved.

7. Refrain from providing forms with no assistance or review.

Some of the forms which will be required are simply too complicated for a self-represented litigant to complete without assistance. Your expert assistance in the completion of these forms is not only a best practice but will also reduce any potential liability.

8. Do not encourage a self-represented litigant to handle a matter that is too technical or difficult.

A prime example of this problem is preparation of a factum. Part of your responsibility as a lawyer is to counsel a person *against* handling such a matter and to help them understand the cost/benefit analysis of using their litigation budget wisely to acquire the expert assistance in the areas where they most need it. This is an individualized assessment.

Be mindful of the whole legal process for a particular matter when working on only part of the process. On a limited scope retainer, you have an obligation to alert the client to apparent issues outside the limited scope of the retainer. Issues such as limitation dates and the consequences of missing them should be drawn to the client's attention, even if you are not retained to determine the specific limitation date in the matter.

f) The End of the Limited Scope Retainer

When the limited scope retainer is complete and your involvement as the lawyer has ended, confirm the end of the retainer in writing. If your initial limited scope retainer agreement was clear, it should be obvious to both you and the client that the matter is at an end, but confirm it in writing anyway.

Confirm the advice, the qualifications and the risks you explained to the client, and remind the client of any important steps related to the legal problem that you want to emphasize must be done by the client or by another lawyer.

When you confirm that the limited scope retainer is ended, clearly state that you will not be doing anything else in the matter.

Sample limited scope retainer agreements are found in the Appendix.

g) Limited Scope Retainers Summary

The limited scope retainer does not exempt you from the duty to provide competent and ethical representation to the client (see **Code Rule 3.1-2 Commentary [7A]**).

There are specific rules about limited scope retainers in the Code that you should review before you enter into such a retainer (see especially **Code Rule 3.2-1A**).

Limited scope retainers must be confirmed in writing and must clearly state what you agree to do and what you will not do for the client. Insist on having the limited

scope retainer signed by both you and the client BEFORE you start work on the matter.

DO NOT exceed the scope of the limited scope retainer. If the client wants you to do more, create a NEW written Limited Scope Retainer agreement to prevent misunderstandings about what services the client is requiring you to do.

When appearing on a limited scope retainer, before the appearance you must inform the court of the nature of the appearance by filing the terms of the retainer, other than terms related to fees and disbursements (see **KB Rule 15.01.1(1)** and **Code Rule 3.2-1A Commentary [3]**).

Consider also how to manage communications with the other side. If the other lawyer should not contact your client directly without your consent, give them notice that dealing with the client falls within your LSR representation agreement (see **Code Rule 3.2-1A Commentary [4]** and **7.2-6A**).

I. OTHER LIMITED RETAINER AGREEMENTS

1. Independent Legal Advice (ILA)

Giving independent legal advice is a form of a limited scope retainer. You have the same ethical and professional obligations relating to competence that you have with a full service retainer. It is rare for lawyers to have clients sign retainer agreements when the client is seeking independent legal advice only, but it would be a good idea to have the client do so.

Generally, a client comes to you for independent legal advice about a transaction or an agreement.

> Remember that you must go further than simply explaining the legal meaning of the matter and the potential consequences for the client. Obtain enough information and ask enough questions so that you can discuss and confirm with the client whether the terms of the transaction or agreement are appropriate in the circumstances and are what the client wants and expects.

You must also ask enough questions to be certain that you have confirmed:

- that your client has legal capacity (age, sound mind);
- whether the client is subject to any undue influence; and
- if the client has any issues in communication (impaired vision or hearing, limited knowledge of the language of the document or your language) then you must be sure you and the client understand each other, and you may need to arrange for an independent interpreter.

Important points to remember when acting for a client who has retained you to give independent legal advice:

1. Use a checklist to be sure that you do not miss any important issues and as a supplementary record of what you discussed with the client.
2. Take detailed contemporaneous notes to keep in the file.
3. Send a brief reporting letter that covers the essential matters you discussed with the client, including the scope of services you provided and any recommendations you made to the client regarding the matter outside the scope of your services.

See the Appendix for suggested checklists.

2. Witnessing Signatures on a Transfer or a Mortgage under *The Real Property Act*

The Real Property Act of Manitoba requires a lawyer to witness the signatures of the transferor on a transfer of land and of the mortgagor on a mortgage where those respective documents are signed in Canada.

> ***Transfers witnessed by barristers or solicitors***
> ***72.5(1)*** *If a transfer is executed within Canada, the signature of the transferor must be witnessed by a barrister or solicitor entitled to practise in the province or territory where the transfer is executed.*
> ***…***
> ***Mortgages witnessed by barristers or solicitors***
> ***72.7(1)*** *If a mortgage is executed within Canada, the signature of the mortgagor must be witnessed by a barrister or solicitor entitled to practise in the province or territory where the mortgage is executed.*

These requirements help prevent fraudulent real property transactions by ensuring that the person signing the transfer or the mortgage is in fact the person named on the documents. You have a professional obligation under **Code Rule 3.2-7** to be on guard against being used to assist any dishonest or illegal conduct by anyone, and to be aware of the risks of being duped into assisting a fraudulent transaction or being an unwitting assistant to money-laundering activity.

Knowing those risks, it is expected that you will make the same inquiries and take the same steps to verify the signatory's identity that you would take if you were being retained by any other client. It is also expected that you will ask questions about the nature of the transaction to satisfy yourself that the source of the funds behind the transaction are not linked to money laundering efforts or other criminal activity.

Open a file to keep track of the result of your inquiries for all signatures that you witness under *The Real Property Act*, even if the person is not able or willing to retain you to represent them on the transaction. You should record all the information you discover that confirms the person's identity and that the transaction is not linked to money laundering or other criminal activity.

3. Confirming the Identity of Signer

When confirming the identity of the signatory, follow the rules for verifying a client's identity. These rules require more than just "reasonable effort", and when dealing with witnessing a signature on a transfer of land or a mortgage, you are expected to apply that higher standard.

Decline to witness the signature if you obtain information that causes you or ought to cause you to know that you would be assisting in fraud or other illegal conduct.

Before you witness the person's signature, you should also ensure that the person has capacity, does not appear to be under any undue influence to sign the document and understands the basic consequence of signing the transfer or the mortgage. If you are having reasonable doubts about any of those matters, you should refuse to witness the signature.

For more information on client identification, see The Law Society Rules, Part 5 Protection of the Public, Division 12, Client Identification and Verification (Rules 5-118 – 5-128). For detailed information on how to verify the identity of an individual or a corporation, see *Client ID Verification* and *When Your Client is not Human: Verifying the Identity of an Entity*.

4. Witnessing a Signature or Notarizing a Document

If you are not being asked for legal advice and you are asked to simply witness a signature, other than a signature on a transfer or mortgage under *The Real Property Act*, you should document the fact that you are simply acting as a witness to the signature by writing under your signature "no legal advice sought or given". You must be careful to ensure the person does not reasonably conclude that you are entering into a solicitor-client relationship with them if you are only witnessing the signature. Be very careful that you do not give ANY legal advice.

In such a situation, where it is not essential that it be a lawyer who witnesses the signature, it is likely better that you let someone else witness that signature to limit any risk that the person signing thinks they are getting legal advice simply because you are a lawyer.

If you decide that you want to witness the signature, as a lawyer you still have the professional obligation to ensure that, at minimum, you are witnessing the signature of the person who is supposed to be signing the document. Obtain and keep a copy of their identification. Satisfy yourself that they understand what they are signing. Record detailed notes in writing about your conclusion on their capacity, whether there were any signs of undue influence, and the proof offered that the person was who they said they were and the proper person to be signing the document.

When you are acting as a notary public only, be clear that you are not acting as a lawyer and you do not represent the person seeking your notarial services. Always be mindful about whether the other person might reasonably conclude that you are providing legal services, creating a lawyer-client relationship.

5. Retainer Agreements Summary

1. Have a written retainer agreement signed by every client on every new matter as a record of the contract between you.
2. Send a non-engagement letter when you decline to act, or when a potential client does not retain you.

3. It is a good business practice to require every potential client to pay you a money retainer or deposit toward fees before you open a file or begin any work for that client.
4. A basic retainer agreement can be standardized so your client is informed of your standard firm practices regarding general communication, fees and legal services.
5. Follow the specific guidelines when you provide legal services for a client on a contingency basis, on a joint retainer, or on a limited scope retainer. Know these rules before drafting those retainer letters, or doing the work.
6. Giving independent legal advice (ILA) is a special retainer with its own guidelines.
7. *The Real Property Act* generally requires a lawyer to witness a signature for a transfer of land (s. 72.5) or a mortgage (s. 72.7) within Canada, and you have professional obligations in that situation, even if the signatory does not want to retain you for legal services beyond the witnessing of the signatures.

J. APPENDIX - ONLINE RESOURCES

ALBERTA

Interactive Retainer Letter

BRITISH COLUMBIA

Law Society of British Columbia:

Sample Retainer Agreement

Sample Joint Retainer Agreement

Independent Legal Advice Model Checklist

Model Non-Engagement Letters

Checklists by Practice Area

Lawyers Indemnity Fund:

Practice Management and Wellness – Risks and Tips

- *Managing the Risks of a Limited Scope Retainer*
- *Independent Legal Advice*
- *Witnessing Signatures*

NOVA SCOTIA

Lawyers' Insurance Association of Nova Scotia Resources

- *Limited Scope Representation Agreement - Sample Form*
- *Limited Scope Agreement - Sample Checklist*
- *Limited Scope Retainer - Sample Wording for Inclusion in a Fee Agreement*

Professional Family Law Standard #11: Scope of Representation for further Limited Scope Retainer-related resources

ONTARIO

Law Society of Ontario

- *Retainer or Non-Engagement*

Example of Website of Law Firm Offering Limited Scope Retainer Options (Heft Law)

PRACTICEPRO/LAWPRO:

Model Retainers and Agreements - General, Criminal, Estate Administration, Estate Probate, Family Law

Limited Scope Retainer Resources

- Limited Scope Representation *Flow Chart for Client*
- Limited Scope Representation *Flow Chart for Lawyers*

Retainer Agreement for Limited Legal Advice and Services – Family Law matter

Checklist of Topics and Legal Services Topics Covered During Consultation – Family Law interview

CANADIAN LEGAL RESEARCH INSTITUTE FOR LAW AND THE FAMILY (ALBERTA)

Canadian Legal Research Institute for Law and the Family, Research Report August 2018 - *Client and Lawyer Satisfaction with Unbundled Legal Services: Conclusions from the Alberta Limited Legal Services Project.* The findings supported 13 conclusions about Limited Scope Retainers [LSR] which can be found at pages 63-64. The recommendations made are found at pages 64-65.

THE NATIONAL SELF REPRESENTED LITIGANTS PROJECT

The *National Self Represented Litigants Project* website

The Nuts & Bolts of Unbundling: A NSRLP Resource for Lawyers Considering Offering Unbundled Legal Services, Julie Macfarlane and Lidia Imbrogno

MISCELLANEOUS

Avoid a Claim – Managing Client Expectations to be Safe on Limited Scope Retainers

The *Self-Rep Navigators* is a group of lawyers working with self-represented litigants who, among other purposes, promote limited scope retainer practice.

THE CANADIAN BAR ASSOCIATION

Limited Scope Retainers