



**The Law Society
of Manitoba**

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TAKING CLIENT INSTRUCTIONS

Practice Management

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TAKING CLIENT INSTRUCTIONS

INTRODUCTION

Taking proper steps to obtain, understand and document client instructions is essential to ensure that you are aligned with your client's objectives and to safeguard against potential misunderstandings. Failings in this area are a common source of complaints and insurance claims. This article aims to help you practice safely in this critical area and serve your clients effectively.

These comments are intended as guidance when dealing with clients who have capacity, and do not address issues related to client capacity in various circumstances. For more information on capacity, see [Chapter 1](#) of the Wills and Estates material in the Law Society Education Center.

FIRST STEPS

Your first step is always to properly identify your client in compliance with the anti-money laundering rules. For more information, see [Anti-Money Laundering](#) in the Professional Responsibility section of the Education Center.

It is prudent, and should be ordinary practice, to open a file and enter into a retainer agreement with every client. For more information, see [Retainers](#) in the Education Center.

INSTRUCTIONS

Instructions can include directions from the crucial to the mundane. Examples include directions to launch or defend an action, to issue or accept an offer to settle, to proceed with or avoid a particular course of action, to take certain procedural steps, to obtain an expert report or other evidence, to propose or sign a contract for employment, purchase or sale, financing, or to resolve a family law matter, corporate dealings, estate freezes and criminal pleas.

Even an apparently routine step, such as arranging an adjournment, may warrant prior consultation with your client, depending on circumstances such as the client's desire to be involved in the day-to-day conduct of their matter.

OBTAINING CLIENT INSTRUCTIONS: CODE RULE 3.2-2C

The key to properly obtaining client instructions is encapsulated in Code Rule 3.2-2C and Commentaries [1] and [2], which emphasize the importance of clients receiving informed and independent advice before they provide instructions.

Code Rule 3.2-2C Advising Clients

A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.

Commentary [1] *Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed. There may not be a need for the lawyer to obtain explicit instructions for every single step on a matter. Before taking steps, a lawyer should consider whether and to what extent the client should be consulted or informed. Fundamental decisions such as how to plead and what witnesses to call almost always require prior consultations. The same may not be so with less fundamental decisions. When in doubt, the lawyer should consult with the client. A lawyer should obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.*

[2] *A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based. If it is apparent that the client has misunderstood or misconceived the lawyer's advice, matters concerning the position taken or what is really involved in the matter, the lawyer should explain the matter further to the client to a sufficient degree so that the client does understand.*

COMMUNICATION PROTOCOLS

It is important to set up communication channels with your client. You need to be able to reliably reach your client in order to obtain their instructions. If you have difficulty contacting a client to obtain instructions and your reasonable steps to locate them fail, you should consider withdrawing. (See Code Rule 3.2-2C Commentary [6])

Your client also must know how to reach you and should be informed about the most effective ways of providing instructions, whether through email, phone calls, or in-person meetings.

Setting communication protocols during your first meeting with your client, and including them in your retainer agreement, help set clear expectations and ensure that all instructions are received and understood in a timely manner. This is particularly important when instructions may change. It is also crucial that your client feels comfortable and understands the importance of asking questions, advising you of new developments and information, and expressing concerns.

For more information on communicating with your client, see [Client Communications](#), available through the Member's Portal.

IDENTIFYING YOUR CLIENT – WHO IS INSTRUCTING YOU?

Your duty of care is owed to your client, and your instructions must come from them. Your client is not the referring person or lawyer, your client's parent, or someone else who may pay your bills.

In cases where you represent an organization, although you must take your instructions from a person, the organization itself is your client, not its shareholders, officers, directors or employees. The person who provides the organization's instructions must be acting within their authority, and who has this authority should be specified in your retainer agreement. (See Code Rule 3.2-3 When the Client is an Organization and Commentary [1])

It is important that the shareholders, officers, directors and employees understand that you represent the corporation and are not acting for them personally, or to protect their interests. Setting this out clearly in your retainer agreement, and advising in writing that you do not represent such individuals and that they should seek independent legal advice is a practice that will help you avoid claims. (See [Zimak v. 4244354 Manitoba Ltd. et al](#))

TAKING INSTRUCTIONS: BEYOND FOLLOWING ORDERS

Taking instructions is more complex than simply asking your client what to do and then doing it. In [Harela v. Powell](#), the lawyer's view that he must merely ask the clients what they wished him to do and then carry out their instructions was described by the court as "a singularly unprofessional approach to the practice of law [which] places an unreasonable demand upon the clients that they should know exactly what the lawyer ought to do and instruct the lawyer accordingly."

Providing proper advice requires you to listen to your client, analyze their situation and discuss their goals, making sure they understand the options and the potential outcomes, risks and benefits, prior to taking their instructions.

ENSURING COMPREHENSIVE UNDERSTANDING

You have a duty to explain legal matters so that your client fully understands, and thus has a basis for making decisions and instructing you.

Clients may not always articulate their instructions clearly or may not fully understand the legal implications of their decisions. You should ask clarifying questions to ensure you fully grasp your client's needs and objectives. In many cases it will be insufficient to simply ask if they understand. You might need to ask them to explain, in their own words, what they would like you to do and why. It may be helpful to then summarize your client's instructions and confirm their understanding before proceeding.

OVERCOMING BARRIERS TO UNDERSTANDING

There may be many impediments to your client's ability to make good decisions or give good instructions. They may be emotionally distressed, depressed, anxious, nervous or addicted. You should be cautious about taking their instructions in these cases. It is crucial that you try to ensure that the decisions they may be making today are those that they would still make in the future. Reality testing and talking about the implications of their decisions, including future risks, are important parts of providing proper advice.

Clients may be under external pressure from someone or by circumstances. The client who has set a wedding date without yet being divorced, the client who has signed an offer to purchase without yet having the necessary funds, or the client who absolutely refuses to go to trial, may feel pressured to make decisions to conclude their matters that they otherwise might not.

Be alert for clients who may have diminished capacity and difficulty providing instructions.

Code Rule 3.2-9

When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary [1] *A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. **The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.** 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.*

In **The Client with Mental Illness or Impairment** the Law Society of Saskatchewan notes that the presence of illness or impairment does not necessarily mean your client will be unable to provide instructions. If your client has difficulty understanding your advice or instructing you, it would be wise to provide your advice in writing and ask for written instructions, or confirm oral instructions in writing. Giving your advice in writing will allow your client to review and absorb your advice at their own pace and ask questions. Ultimately, if you cannot get reliable instructions, you may need to withdraw.

For suggestions for working with clients living with chronic and serious mental illness whose capacity may be fluid, see [Assisting the Client Living with the Effects of Serious Mental Illness](#).

Code Rule 3.2-9 Commentaries [2] – [5] provide guidance on steps to take if you believe the client does not have the capacity to provide instructions. In brief, you should generally decline to act. In the event the person has no other agent or representative and harm could result from inaction, you may act to the extent necessary to prevent harm until a legal representative is appointed. If the client's incapacity arises while you are acting, you may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Public Guardian and Trustee to protect your client's interests.

ACCOMMODATING LANGUAGE, SPEECH AND HEARING ISSUES

Some clients may need accommodations for language, speech, or hearing issues. Where interpreters are used, it is wise to engage a neutral and certified party, rather than relying on a friend or family member, who may not be reliable or accurate, or who may pressure the client in ways you do not understand. Technology such as Teletypewriters (TTY), Telecommunications Device for the Deaf (TDD) and Text Telephones (TT) may be useful for the hearing impaired.

Be sensitive to cultural nuances that may affect communication. Understand and respect cultural differences which may also impact your client's understanding and responses and your assessment of them. For example, individuals in some cultures don't question those they see as having authority, and may find it impossible to say no, disagree or contradict what you are saying. Ensure that your client is considering their options and choosing what they believe as best, as opposed to letting you make their decisions. Remember that sometimes nodding means "I'm listening", rather than "I agree" or "I understand", and sometimes a hesitant "yes" really means "no".

ADVISING ON LEGAL IMPLICATIONS

Code Rule 3.2-2C and Commentary [1] are crystal clear that your client must be fully and fairly informed by you to enable them to give you appropriate instructions.

You have a duty to set realistic expectations, and to present and explain options for action so your client has, and understands, enough information to make their decisions and instruct you accordingly. This includes the obligation to present and explain offers, even where you are certain your client would not accept. Failure to do so has led to complaints.

Clients need to understand the implications of the instructions they are giving, the possible risks and potential outcomes. The headnote for *Major v. Buchanan et al.* summarizes:

A solicitor has a duty to warn a client of the risk involved in a certain course of action, contemplated either by the client or the solicitor on his behalf, and to exercise reasonable care and skill in advising him. If he fails to warn the client of the risk, and

it is probable that the client would not have taken the risk if he had been warned, the solicitor will be liable to the client in damages. If he warns the client, he can only proceed with the course of action if instructed to do so. Moreover, if he fails to exercise reasonable care and skill in advising the client with respect to the risk, and if the client probably would not have undertaken the course of action if he had been properly advised, the solicitor will be liable if the client suffers any loss thereby.

See also [Credit Foncier \(Canada\) v. Grayson, Rushford, Cooper, Nidesh and Arendt](#). Although the solicitors had received their client's instructions, they had failed to warn them of its implications, which the client did not understand. The solicitors were found liable for the client's loss.

This issue may also arise in the context of criminal proceedings. For example, before providing their instructions, the client must understand not only the various plea options, but also the implications of each, including the fact that by choosing a particular course of action, they may be creating difficulties for themselves with employment and/or immigration status.

DOCUMENTING YOUR ADVICE AND YOUR CLIENT'S INSTRUCTIONS

Maintain meticulous records of all communications and instructions, including dates, times, and the content of discussions. This includes instructions not to take a specific step, or to do nothing at all.

Documenting instructions to do nothing is particularly important where there is a limitation date, a risk of dismissal for delay, or where the client might otherwise believe you are taking some action on their behalf. In such a case, it is good practice to formally withdraw so that it is clear you are not representing the client.

Written confirmations help to ensure there is no ambiguity about your client's instructions and your subsequent actions or inaction. This documentation can be invaluable in the event of disputes or complaints.

In [Client Advice and Instructions](#), the Law Society of Alberta notes that documenting the advice provided, and the information and assumptions on which it is based, is as important as documenting your client's instructions. Confirming your advice in writing for your client helps minimize the risk of misunderstandings. Making detailed notes (rather than just setting out that "various options were considered") will be helpful if there is a complaint against you, especially if it arises far in the future when your recollection and that of your client may diverge. See [Webb v. Tomlinson](#), where detailed meeting notes showed that the lawyer had explained the risks to his client, who understood and undertook the risks.

Where there is no documentation, a client's recollection may be preferred over yours. In [Edmond & Associates v. Angelatos](#) the client denied both the lawyer's statements that he had

explained the risks to his client and that the client had agreed. Schulman, J. found that while the lawyer had likely made some explanation to the client, he had failed to adequately explain the risks, such that the client did not understand. The Court stated that he should have both explained the risks in writing and obtained written instructions.

In another Manitoba case, a claim arose against a lawyer whose client acknowledged having provided instructions to accept a 5 year limited term of spousal support. The client claimed that she had so instructed because the lawyer had advised her that “no judge in the land” would order more. The lawyer had no documentation showing what her advice had been. The matter was ultimately settled, but only mid-trial.

ISSUING OFFERS

When issuing offers, use extreme caution. If the offer is accepted, your client will be bound. If it is not what your client intended, or if it carries risks your client did not understand, your client (and thus you) will have a big problem.

It is good practice to send your client the offer in draft, and seek their written approval. Even where the offer accurately represents the instructions initially given, sending it in writing to your client before it is issued gives you another opportunity to discuss its implications. Seeing it in writing often generates questions and allows your client to reconsider. It is not uncommon for instructions to be modified once the client has seen the first draft.

UPDATE AND REVIEW

Changes in circumstance may lead to changing instructions. It is important to let your client know when something has occurred or changed which alters your advice or their risks. You also should encourage your clients to let you know of any new events or circumstances, as their significance may not be readily apparent to the client. This will give you and your client the opportunity to review ongoing matters, reassess goals, and confirm or modify your advice and/or their instructions as necessary.

DEALING WITH DIFFICULT CLIENTS

Clients who are indecisive, overly demanding, or who have unrealistic expectations may need more communication and documentation in order to prevent misunderstandings and manage expectations. They also may require some extra empathy and patience on your part. For a larger discussion, see Client Communications, available through the Member’s Portal.

RESPECTING CLIENT AUTONOMY

Respecting client autonomy involves acting on the client's instructions even if they differ from your recommendations, provided the instructions are legal and ethical. Balancing professional judgment with client autonomy is necessary.

If your client is giving you instructions against your advice, it is especially important to make sure they understand the implications of their choice. Setting out again in writing, why you are recommending against the course of action emphasizes the seriousness of your concerns. It will be useful to have your client sign a duplicate copy of your letter, acknowledging that they have read it and are providing instructions that are against your advice, in case your worst fears for your client are realized and they look for someone to blame (often, you).

Sometimes you may feel so strongly that your client is making the wrong decision that in good conscience you are unable to accept their instructions. In such a case of serious loss of confidence, you have the option to withdraw.

Code Rule 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.

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.*

In [*Kuny v. Pullan Kammerloch Frohlinger et al.*](#), a client initiated two separate claims of professional negligence and misconduct against Pitblado LLP and Pullan Kammerloch Frohlinger (PKF). The client sought advice from and instructed Pitblado to initiate an appeal and stay of a decision of the College of Registered Nurses of Manitoba. After a dispute about whether the stay instructions had changed, Pitblado withdrew as counsel, stating that there was a breakdown in the lawyer/client relationship.

PKF had strongly advised the client against commencing claims against the College since the chances of success were remote. The client accused PKF of siding with the College, and eventually PKF terminated the lawyer/client relationship.

The client claimed that each of the lawyers had breached their duty of care by failing to follow his instructions. The Court said:

[41] *In my opinion the plaintiff is under the mistaken impression that a lawyer, whether acting as a solicitor or a barrister, is under an obligation to follow a client's instructions regardless of the fact that a lawyer's duty to his client must be considered in the context of his broader legal and ethical obligations.*

The Court quoted Rivoalen A./A.C.J. (as she then was) in [Skinner v. Skinner](#):

23 *Clients can take unreasonable positions, but lawyers must serve as their own gatekeepers of professional conduct rather than blindly following instructions. Lawyers are not free to act on whatever instructions they might receive from their clients. On the contrary, lawyers are obliged by their rules of professional conduct to refrain from acting on certain instructions. Put another way, distinct restrictions or disabilities accompany the rights and privileges afforded to lawyers. One such restriction or disability precludes them from carrying out the instructions of over-zealous clients.*

24 *It is the lawyer who has conduct of a litigation file – not the client. The lawyer must maintain a certain independence from the client and must not let the client override his professional judgment. The lawyer is required of course to take instructions from the client, and owes a duty to do his best for the client; but an important part of the lawyer's job is to steer the client through the rocky territory of litigation. The lawyer is responsible for his word, both to the Court and to opposing counsel. He owes a duty to each. The lawyer must maintain his integrity and the honour of the profession at all times – even in the face of assertive clients and challenging courtroom environments. All of this is essential to his reputation and relationships with opposing counsel, which are of fundamental importance to the practice of law.*

The Court noted that rather than breaching his duty to the client, the actions of the PKF lawyer were “in fact good examples of counsel acting in a responsible manner in relation to the plaintiff by maintaining conduct of the litigation file, and not allowing him to override her professional judgment.”

The client's appeal to the Court of Appeal was dismissed ([Kuny v. Pullan Kammerloch Frohlinger et al](#)) as was his motion for a rehearing in the Court of Appeal ([Kuny v. Pullan Kammerloch Frohlinger et al](#)) and his application for leave to appeal to the SCC. ([Douglas J. Kuny v. Pullan Kammerloch Frohlinger, et al](#))

You also must ensure that following your client's instructions do not make you the unwitting accomplice of a dishonest client.

Code Rule 3.2-7 Dishonesty, Fraud by Client or Others

A lawyer must never: (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct; (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others; or (c) instruct a client or others on how to violate the law and avoid punishment.

Commentary [1] *A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.*

Code Rule 3.2-8 deals with dishonesty or fraud if your client is an organization. In such a case, in addition to your obligations under Code Rule 3.2-7, you must also advise the person from whom you take instructions or the CEO or Chief Legal Officer that the conduct should

be stopped, and if necessary continue to so advise up the ladder of control. If the organization will not cease the wrongful conduct, you cannot take those instructions and should withdraw.

INDEPENDENT LEGAL ADVICE

You have the same ethical and professional obligations when you are retained only to provide independent legal advice. Do not neglect to have clients sign retainer agreements when they are seeking independent legal advice only.

It is very important to 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.

In *Independent Legal Advice*, LIANS reminds that the client to whom you provide ILA is often exposed to significant liability or prejudice and frequently receives no corresponding benefit. You must take the time to understand and analyze the transaction, the client, and the circumstances in order to be sure the client understands their rights and responsibilities and the risks they may face.

It is important to document your advice and any instructions you receive. Take detailed notes of the steps taken, documentation reviewed, discussions and advice given and the client's instructions. In the event the client decides to proceed against your advice, have the client acknowledge that they are doing so in writing.

The *CBA Task Force Conflicts of Interest: Final Report, Recommendations, and Toolkit 2008*, offers some guidelines for giving independent legal advice:

1. If the client needs an interpreter, have a neutral party interpret rather than a member of the family.
2. Gather enough information about the circumstances surrounding the transaction to be able to explain them to your client and predict problems. In particular gather information on the client's age and level of experience, the client's motivation, the relationship of the parties and their relative bargaining power. Find out enough about the client's financial situation to know the financial impact of the transaction.
3. Ensure that your client understands not only the nature and effect of the document, but also the client's underlying rights and entitlements.
4. Rather than ask clients if they understand the document in question, have them explain in their own words their understanding of the transaction.
5. Ensure clients are exercising their own free will. Be especially diligent if the guarantor is a relative of the borrower, subservient to the borrower, or an unsophisticated party.
6. Be sure the document is complete in all respects before you or the client sign.

LIMITED SCOPE RETAINERS

It is important that the client's instructions as to scope of the retainer are clear so you and the client both understand exactly what you are being retained to do, and what will not be your responsibility. A detailed retainer agreement essential.

JOINT RETAINERS

If you are asked to act for two or more parties, you can only do so if the clients agree you may act for them on a joint retainer. You can only act jointly for clients when their interests are not in conflict and their instructions are the same.

A joint retainer agreement must be in writing. You must advise the clients that in acting for all of them, no information from one can be treated as confidential from the others, and if a conflict develops that cannot be resolved, you cannot continue to act for all of them and may have to withdraw. See Code Rules 3.4-5 and 3.4-8.

Many clients will want you to act for them on a joint retainer even where there is a potential for conflicting interests to arise. You must draw to their attention the risks that they are assuming, and when one of the clients is less sophisticated or more vulnerable, you should recommend that they get independent legal advice before consenting to a joint retainer. This is so, even when you are asked to act for spouses or common law partners who believe their interests are aligned. Note the special rules when acting for spouses or common law partners in the preparation of joint wills. See Code Rule 3.4-5 and the Commentaries and Code Rule 3.4-7.

PAYMENT INSTRUCTIONS – CYBER SECURITY

Be wary of receiving late directions which appear to change previous payment instructions. This kind of instruction should never be accepted at face value. You must contact your client using contact information in your file, and not in the new instructing message. For more information, see [Fraud Awareness](#) in Trust Accounting Fundamentals in the Law Society's Education Center.

CONCLUSION

Properly obtaining, understanding, and documenting your client's instructions is fundamental to effective legal practice. You must ensure your client is fully informed before providing instructions, and balance your professional judgment with respect for client autonomy. By understanding your clients' needs, communicating well, and maintaining meticulous records, you can protect both your clients' interests and your own professional integrity.