

TERMINATION OF THE RETAINER

RULES OF PROFESSIONAL CONDUCT

RULE 2.09 - WITHDRAWAL FROM REPRESENTATION

RULE 6.03 - RESPONSIBILITY TO LAWYERS AND OTHERS

In most cases disengagement will occur when the retainer is completed. The client has the right to terminate the retainer at any time - the lawyer does not. Pursuant to rule 2.09 "Withdrawal from Representation", *Rules of Professional Conduct*, you cannot withdraw your services except for good cause and upon appropriate notice to the client.

MANDATORY WITHDRAWAL

In certain circumstances you will have a positive duty to withdraw. Examples outlined in the *Rules of Professional Conduct* are:

- instructions inconsistent with your duties to the court,
- if the client is guilty of dishonourable conduct in proceeding,
- if the client is taking position solely to harass or maliciously injure another,
- if it becomes clear that the lawyer's continued employment will lead to breach of professional conduct rules (ie. conflict of interest).

As always, you must first inform your client of your intention to withdraw.

OPTIONAL WITHDRAWAL

Circumstances where you will have an option to withdraw are usually confined to where there has been loss of confidence between you and your client. Examples include:

- if the client deceives you,
- if the client refuses to accept and act upon your advice on a critical or significant point (failure to accept and act on your advice may amount to a loss of confidence justifying withdrawal).

Non payment of Fees

Non payment of fees will justify withdrawal of your services, but not if the client becomes seriously prejudiced, and only after reasonable notice to provide funds on account.

Criminal Proceedings

Commentary to subrule 2.09(4), "Withdrawal from Criminal Proceedings" and Commentary speak to when, and how you will be permitted to withdraw in the face of an impending criminal trial. Termination for non payment may not be allowed if the trial date is too soon for the client to adequately retain a new lawyer. If you are taking on criminal cases, it is incumbent on you to ensure that you have billing and payment issues settled with your client well in advance of trial.

NOTICE OF WITHDRAWAL

Regardless of the reason for the disengagement you should:

- prepare a written record of the circumstances giving rise to the termination and the reason or reasons why you must terminate your services;
- advise the client promptly of your decision to terminate and the reasons why;

- confirm your termination of services with your client in writing.

A useful checklist, “Checklist for Disengagement/Termination Letter” appears at page 27 of Bell, *Managing the Lawyer/Client Relationship*.

MATTERS TO BE ADDRESSED AT TERMINATION

Once the retainer has been terminated, you must ensure that:

- confidentiality is maintained,
- you record necessary information for conflicts of interest checks in the future,
- you render your final account for fees and disbursements,
- the client’s property is returned,
- the client receives all information which may be required in connection with the case or the matter,
- you account for all funds of the client held or previously held,
- you return any refund for remuneration not earned during your employment,
- you assist new counsel by advising him or her of the status of the matter,
- you cooperate with the successor lawyer to protect the client’s interests,
- your file is retained for an appropriate period of time,
- your trust records relating to the client or the matter are retained for the applicable period of the time required under the Law Society By-Laws and Regulations.¹

FILE OWNERSHIP AND TRANSFER OF FILE

Once the retainer has been terminated, you should deliver the client’s documents back. Clause 2.09(9)(a), part of the sub-section entitled “Manner of Withdrawal,” provides that your obligation to deliver papers and property is subject to your limited right of lien for unpaid fees. If there are conflicting claims, you are under an obligation to make every effort to settle the claims.

The issues which arise in file transfer situations include:

- what documents belong to the client,
- who pays for the copies of documents made when the file is to be transferred out,

¹Currently, paragraph 6(2) of By-law 18 requires that a member keep trust records for at least ten years immediately preceding the member’s most recent fiscal year end.

- who pays for the cost of preparing the file for transfer.

If you receive a direction from another lawyer to forward your client's documents, subject to payment of fees, you should do so promptly. When transferring files between lawyers, it may be advisable to meet with the new lawyer to assist the new lawyer in getting up to speed. This will assist your client and his or her new lawyer by reducing time and costs in reviewing the file, especially if the file is large. For further discussion regarding issues relating to file transfers see the Practice Management Helpline article "[File Transfer on Termination of Retainer](#)".

If your fees remain unpaid a meeting is also advisable if the successor lawyer needs to review the file to protect the client's interests. In the meantime, arrangements for payment of your fees may be made. Or, you may choose to release the file on the condition that the successor lawyer undertake to protect your account. In any event, you should not enforce your right to retain the file for unpaid fees if to do so will materially affect the client's position.² For further discussion regarding liens see the Practice Management Helpline article "[Solicitors' Liens](#)".

UNDERTAKINGS TO PROTECT YOUR ACCOUNT

If you decide to release the file on the other solicitor's undertaking to "protect your account", the undertaking should be clear as to its terms and in writing. What specifically is the other lawyer, (or you, if you receive a file under these circumstances) undertaking? Is your account to be paid by the other lawyer personally or only from settlement funds? When is your account to be paid? What happens if at the time the client receives settlement funds the lawyer giving the undertaking is no longer solicitor for the client? These are just some of the issues which must be resolved when undertakings to protect lawyers' accounts are to be given.

Undertakings given to other lawyers require the same considerations as any other undertakings incurred, assumed or undertaking on behalf of clients. Subrule 6.03(8), "Undertakings" provides that the lawyer should give no undertaking that cannot be fulfilled and the lawyer should fulfill every undertaking given.



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²Rule 2.09, "Withdrawal from Representation", *Rules of Professional Conduct*, (a) and Commentary.