

ESTABLISHING THE RETAINER

PART I PRELIMINARY MATTERS AND THE INITIAL CONSULTATION

1. CHECK FOR CONFLICTS OF INTEREST

You should perform a preliminary check for conflicts of interest upon the very first contact with the prospective client, before he or she provides you with any confidential information about his or her matter. Once you have determined that there are no potential or actual conflicts of interest, you should then screen the prospective client to decide whether or not you will agree to act in the particular matter. Depending on the added information you receive through the initial screening and consultation with the prospective client, you may be required to do additional checks for conflicts before agreeing to represent the client in the matter.

2. SCREEN THE CLIENT

After you have confirmed that there are no conflicts of interest, the initial screening can be done prior to the initial consultation by having the prospective client complete a client information form, or by having a member of your support staff obtain the relevant information by telephone. Sometimes it is impossible to have the information form completed until the prospective client arrives for his or her appointment. You may want to have the prospective client come in few minutes prior to the initial meeting to fill out the form at your office. Alternatively, you may obtain the information during the initial consultation itself.

Ideally, you should obtain as much information as possible about the matter before meeting with the prospective client. A standard form such as a Client Information Form¹ allows you to obtain useful information at the beginning of the matter. A detailed Client Information Form can be used to

- keep track of the source of your clients
- conduct a secondary and detailed check for conflicts of interest
- save time during the initial consultation to focus on the client's concerns
- ascertain what the client wants or expects from you
- determine the nature of the matter so that you can estimate the scope of the work and the potential cost to the client
- prepare for the interview by doing some preliminary research so that you can provide better service to the client at the first meeting
- function as a Memorandum to File both in the event you are retained, or in the case of non-engagement to avoid subsequent conflicts or breaches of confidentiality

¹ *O'Brien's Encyclopedia of Forms* has a useful Client Information Form specifically for family law matters. You may want to draft your forms to serve your particular needs.

Apart from considerations of malpractice, you must decline employment if

- you do not feel competent to handle the matter²
- you reasonably foresee undue delay in providing the service to the client³
- you are not competent to handle the matter, obtain your client's instructions to obtain assistance from other counsel or advisors⁴

In addition to the Client Information Form, a *Client Screening Checklist* will assist you in determining whether you are willing or able to take the client on.⁵

If you decide **not** to act in the matter, you must advise the prospective client immediately and should confirm in writing by way of a non-engagement letter.⁶ Common sources of claims for malpractice arise as a result of misunderstanding between solicitor and client as to whether or not the lawyer was actually retained to protect the client's interests.⁷ Paralegals should also consider this.

If you decide that you are prepared to meet the client for an initial consultation after the preliminary screening, you should continue to screen during the consultation. Sometimes the information received in the Initial Client Consultation Form is inaccurate.

3. THE INITIAL CONSULTATION

This is the time ensure you and your client are clear about the nature of the services you will provide, of your fee or the range of your fee, your billing policy and what will generally justify withdrawal of your services. The following are suggestions to assist you with your initial meeting:

- have the client execute a Written Retainer Agreement; insist that the client take the time to read the written agreement before execution
- ask for your money retainer payable now, if possible

² Rule 2.01 and Commentary of the lawyers' *Rules of Professional Conduct* and rule 3.01 of the *Paralegal Rules of Conduct*.

³ Ibid.

⁴ Ibid.

⁵ Bell, see for example, "Checklist for Client/Case Screening" from Bell, *Managing the Lawyer/Client Relationship*, at page 17.

⁶ Bell, *Managing the Lawyer/Client Relationship*, see Checklist for Non-engagement Letter at page 25.

⁷ Bell, *Managing the Lawyer/Client Relationship*, 8.

- if the client does not pay the money retainer, subject to protecting the client's interests,⁸ do not do any work on the file until you have a money retainer and an executed retainer agreement, advise the client accordingly, and
 - confirm via letter that you are not the prospective client's lawyer until properly retained (i.e., until you receive a money retainer and an executed retainer agreement) and confirm crucial advice; advice on applicable limitation periods should **always** be confirmed in writing
 - if a limitation period is approaching, you must ensure that either you or the client take steps to preserve the client's claim; in certain circumstances (e.g., when the limitation period is only days away) you may be under a positive obligation to commence an action on behalf of the client even if the client does not retain you⁹
 - bring the matter forward for review
 - if you have not been properly retained within a reasonable time, send a letter to the prospective client advising that you are closing the file and, if necessary, remind the client of the crucial advice given and confirmed in the previous correspondence
- use a substantive law checklist to ensure that you cover all necessary matters during the initial consultation
- prepare a Memorandum to File and ensure that all limitation, tickler and follow up dates are entered in your system
 - in each Memorandum to File record any documents received or returned, follow up matters, and a reminder to check on the status of the client's accounts or retainer with the firm
 - some lawyers send copies of the Memorandum to File to the client as a way of keeping the client informed and confirming what information and documentation the lawyer has, or is relying on, in serving the client

4. ENGAGEMENT TO ACT ON BEHALF OF CLIENT

It is incumbent upon you to make clear the nature and scope of the matter you are to undertake. An engagement letter (in addition to the retainer agreement) confirms all of the important terms governing the relationship including confirmation of the client's initial instructions and material facts as understood by the lawyer or paralegal.¹⁰

⁸ Subrule 2.09(1) and Commentary of the lawyers' *Rules of Professional Conduct* and rule 3.08 of the *Paralegal Rules of Conduct*.

⁹ Rule 2.09 of the lawyers' *Rules of Professional Conduct* and rule 3.08 of the *Paralegal Rules of Conduct*.

¹⁰ See Checklist for Engagement/Retainer Letter, at p. 23 of Bell, *Managing the Lawyer/Client Relationship*.

PART II THE RETAINER AGREEMENT

1. THE RETAINER

The term retainer has several meanings. “It can be the act of employing a solicitor or counsel; it can be the document by which such an employment and its terms are evident; it can be an amount given to secure the services of the solicitor or counsel and induce him or her to act, in a professional capacity, for the client.”¹¹

- Money Retainer: an amount paid on account or deposit as security for payment of the fees and disbursements of the lawyer or paralegal.
- Written Retainer: an agreement in writing with the client respecting the amount and manner of payment for services.

2. WRITTEN RETAINER AGREEMENT

The retainer agreement is a legal document, a contract between you and your client. The agreement should define the scope of your legal representation or advice, and describe the manner in which fees and expenses are to be charged and paid. Consider including terms that

- identify the client, or the clients
- describe the services you will provide and have been retained to perform
- describe what if anything is required or expected to be done or provided by the client and by other persons not associated with your firm
- identify personnel in your firm who will be involved with the case and the functions they will perform
- outline a timetable of the conduct of the matter (with appropriate milestones identified), if appropriate
- indicate the method and frequency of communications with the client, if the client is not an individual, identify from whom you are to take instructions and to whom you are to report
- address the ownership of the work product; if it is the property of the lawyer or paralegal, outline the client’s right of access
- deal with transfer or termination of your retainer but note that withdrawal of your services are subject to the lawyers’ *Rules of Professional Conduct* or the *Paralegal Rules of Conduct*

¹¹ Thomas C. H. Baldwin, “Solicitors Retainer,” *Solicitor/Client Relationships*, Canadian Bar Association-Ontario, Continuing Legal Education, June 1, 1998. The suggestions regarding retainers that follows in this part of the module are taken from Mr. Baldwin’s informative article. For more complete account on the subject of retainers, please refer to the article itself.

- indicate the basis on which fees will be set, who will pay in the first instance costs of outside services and disbursements
- provide for a clear understanding as to the frequency of billing of fees and disbursements, and time of payment, including any advance payments or deposits
- provide that interest on lawyers' accounts more than 30 days overdue will be charged in accordance with the *Solicitors Act*
- provide that the retainer does not commence until the agreement is executed and a money retainer has been paid

3. LEGAL AID RETAINERS

Your obligations and duties to your client do not change simply because your services as a lawyer have been retained pursuant to a Legal Aid Certificate. The plan pays your fees, and disbursements according to tariffs. No extra billing is permitted.

4. LIMITS ON WITHDRAWAL OF SERVICES

Always keep in mind your obligation not to withdraw your services except for good cause and upon notice appropriate to the circumstances pursuant to rule 2.09 of the lawyers' *Rules of Professional Conduct* or rule 3.08 of the *Paralegal Rules of Conduct*.

5. THE CAW LEGAL SERVICES PLAN

This plan covers some or all of the costs of certain legal service provided by lawyers for participants of the benefit plan, union members and their dependants. As a cooperating lawyer in private practice, the lawyer contracts with the plan to provide legal services to participants according to the planned fee schedule. Participants are able to engage non-cooperating lawyers in private practice to provide legal services according to the planned fee schedule. Non-cooperating lawyers may extra bill participants over and above the planned fee schedule.

6. PREPAID LEGAL SERVICES

Any prepaid legal plan must allow you to

- exercise independent professional judgment on behalf of the client
- maintain client confidentiality
- avoid conflicts of interest
- practise law or provide legal services in a competent manner



*Legal information and support
designed for you*

Please note that this information is not a substitute for the member's own research, analysis and

judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.