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Initial Contact

Initial contact with the prospective client may occur by telephone, email or in person with the lawyer or a member of the lawyer's staff. Initial contact can compromise the lawyer or firm in representing others in the future, so it must be managed to prevent "confidential information attributable to a solicitor and client relationship relevant to the matter at hand" from being imparted, thereby creating a "risk that it will be used to the prejudice of the" prospective client.[1]

The lawyer should establish practices[2] which:

1. gather enough information to determine if the lawyer can be retained, including information about existing conflicts of interest, urgency, the nature of case, the history of legal representation and the status of legal proceedings; and

2. limit the information received prior to the lawyer's retainer to minimize the risk of future disqualification due to a conflict of interest.

These practices may be standardized into a contact checklist for use with prospective clients.

The following elements are recommended to ensure that confidential information[3] is not imparted during initial contact:

The lawyer or staff member should expressly state that the information to be discussed is:

a. *not confidential* and any information that the prospective client wishes to keep confidential must not be revealed;

b. required to determine if the firm or lawyer is able to provide legal service to meet the prospective client's needs (urgency and substantive issues); and

c. required to confirm there is no conflict of interest.

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[1] *MacDonald Estate* v. *Martin* [1990] 3 S.C.R. 1235 at ¶45. Also see: Conflicts of Interest, *infra*.

[2] "The Less You Know . . .", Elizabeth Cohen, *ABA Journal*, December 2002 at page 62.

[3] In *Fisk* v. *Land* 2004 MBQB 192 at ¶15, Justice Allen, in dismissing a motion by a prospective client to prevent a law firm from representing her ex-spouse on the basis of her preliminary phone calls to a lawyer at the firm, stated:

> In looking at these cases, it seems clear that each one turns on whether the court was satisfied that a reasonable member of the public would be satisfied that confidential information was not discussed. What also seems clear is that in those cases where the lawyer was removed, some particulars of the alleged confidential information was before the court.

Other information to be gathered and maintained in the lawyer's conflict of interest record should include:

1. the full names of the parties and other involved individuals such as new partners and extended family (exact spelling, all past names or aliases used);

2. the address of the prospective client, directions and restrictions on methods of contacting the prospective client;

3. the employers or businesses of the parties' and involved individuals;

4. the current marital status and relationship status of the parties;

5. the full names, ages and addresses of any children involved in the matter;

6. the existence of a marriage contract, separation agreement or court order;

7. the past and current legal representation of the prospective client;

8. a brief outline (perhaps in the form of a predetermined list of categories with checkboxes) of the prospective client's situation and legal services sought, including the urgency of the situation, the dates of any outstanding court proceedings or filing deadlines; and

9. a summary of fees and retainer policies and, where applicable, fees for initial consultations.

The contact checklist should be kept for all inquiries[4], whether the lawyer is retained or not, to serve as proof of the information exchanged during the initial contact.[5]

The same standards apply whether an initial consultation is complimentary or provided for payment.[6] Likewise, care should be taken in receiving referrals from or offering advice to another lawyer about that lawyer's client.[7]

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[4] "Parting Thoughts", *The Office Manager*, Issue #1, Nova Scotia Barristers' Society, June 1992. "Where you do not intend to enter into a solicitor client relationship, protect yourself by explaining that you do not intend to do so and carefully document that explanation" The Law Society of Upper Canada, Practice Management Advisory Tips: "Identifying your clients".

[5] *Fisk* v. *Land*, 2004 MBQB 192

[6] *Sauter* 2003 SKQB 49: the lawyer was removed as counsel for the wife where there was a previous free half hour consultation with the husband.

[7] *Wolfe* 2003 SKQB 474: the lawyer was prevented from representing the husband where the lawyer had earlier spoken with the wife's solicitor in a different jurisdiction about being retained in the same matter.

Client Screening

During the client's initial consultation, the lawyer should assess the client's circumstances and case from various perspectives to determine if the lawyer should agree to represent the client. This assessment might continue during the early stages of representation. The solicitor-client relationship is established by the lawyer: not by the lawyer's staff.[8]

The perspectives that should be considered should include:

1. lawyer's competency;
2. client's competency;
3. client's needs;
4. client's objectives and expectations;
5. potential problem files;
6. possibility of reconciliation;
7. domestic violence;
8. urgent or emergency matters; and
9. involvement of other parties connected to the client.

Lawyer's competency

"A competent lawyer has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client."[9] When the client retains the lawyer, the lawyer has the "duty to be competent to perform all legal services".[10] The client can expect the lawyer to have "the ability and capacity to deal adequately with every matter" arising in the client's retainer.[11] This means that the lawyer must either be competent to provide the legal

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[8] Practice Management Advisory Tips, Law Society of Upper Canada, "Delegating": only the lawyer can accept a client retainer, an assistant can collect administrative information.

[9] *Report of the Competency Task Force*, Nova Scotia Barristers' Society, 2000. The Report provides examples of the appropriate skills, attributes and values.

[10] *Legal Ethics and Professional Conduct Handbook*, Rule 2

[11] *Legal Ethics and Professional Conduct Handbook* – Commentary 2.1.

services required or capable of becoming competent "without undue delay, risk or expense" to the client.[12]

Where unable to meet these requirements, the lawyer should provide the client with information that will assist the client in retaining a different lawyer.[13] Once retained, if the matter becomes more complex than the lawyer is capable of handling, the lawyer should refer the client to capable counsel.[14] Upon receiving informed instructions[15] from the client, the lawyer may consult or collaborate with another lawyer or another professional on a particular issue. The client, and not the lawyer, should retain any individual where additional expertise is needed.[16]

Client's competency

The lawyer must assess the client's competency to give instructions and be satisfied the client is able to instruct.[17] Competency may be impeded by a client's emotional state, situational or environmental considerations, medication, psychological factors, addictions or other issues.[18]

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[12] *Legal Ethics and Professional Conduct Handbook* – Commentary 2.2. Commentary 2.5 also lists the factors for determining the "requisite degree of knowledge" in providing legal services.

[13] *Legal Ethics and Professional Conduct Handbook*, Rule 15 states that "the lawyer who declines employment has a duty to assist the person to obtain the services of another lawyer competent in the particular field and able to act." Also see: commentaries 15.1 and 15.4.

[14] *Legal Ethics and Professional Conduct Handbook*, Commentary 2.7.

[15] "Informed instructions" should include advising the client as to the nature and parameters of involvement of the lawyer or expert, the costs involved, the benefits and detriments, and the outcome or result that can be expected from such involvement, for example: legal opinion on tax implications of property division; actuarial report to ascribe a value to a pension; parenting assessment; accountant's review of unaudited statements of a business; and trusts and estate planning.

[16] *Legal Ethics and Professional Conduct Handbook*, Commentaries 2.1 and 2.7. "Lawyer should consider referring business valuation and tax issues to experts to avoid potential liability for negligence", *CLIA Loss Prevention Bulletin* #106, November 1999.

[17] Where a client is not competent to instruct counsel, the court's involvement will be required pursuant to Civil Procedure Rule 6.07. Also see: Non-Adversarial Dispute Resolution, *infra*.

[18] Justice Aitken of the Ontario Superior Court of Justice wrote, in *McClenahan* v. *Clarke* [2004] O.J. No. 750 (the case was settled prior to hearing the appeal from Justice Aitken's decision):

> It is incumbent on lawyers practising family law to have a basic understanding of interpersonal dynamics and of how those dynamics can impact on a client's abilities and behaviour during the course of a matrimonial file. For example, if a client has suffered abuse in the past, that client may have low self-esteem, may have difficulty absorbing information, may lack confidence in making decisions, may be fearful and may be prone to anxiety and depression. Part of the role of a matrimonial lawyer is to be able to detect personal or familial circumstances that may impact on a client's ability to receive information, make decisions and provide instructions in the normal course. It may be appropriate for the family lawyer to raise concerns with a client about his or her state of mind or preparedness to finalize a separation agreement.

Capacity may fluctuate of differ depending on the specific task required of the client.[19]

Representing of a client may require the appointment of a guardian to give instructions where the client lacks capacity.[20]

Client's needs

The lawyer should be vigilant in assessing the needs of the client, both "to respect human dignity" in the practice of law and "to treat all persons with equality and without discrimination".[21] This may involve identifying special circumstances and characteristics, including but not limited to: ethnic, cultural, linguistic, religious, nationality, literacy, physical, medical, psychological, addiction, age, gender and sexual orientation. Once the client's circumstances are identified, the lawyer should assess whether effective legal representation can be provided.

The client may not have experience in managing day-to-day finances, creating a long-term financial plan, re-entering the workforce or similar matters. In such circumstances, the lawyer should consider referring the client for advice or counselling before the client considers negotiating a final settlement or agreement.[22]

Client's objectives and expectations

The client's objectives and expectations in retaining the lawyer and with respect to the matters in issue should be explored in determining if the lawyer will be retained. Assisting the client to develop realistic expectations as to what the legal process can and cannot achieve is part of the lawyer's service.[23]

As part of the initial consultation, the lawyer should inform the client about the lawyer's personal style, approach and philosophy in handling a family law case. Compatibility between the lawyer and the client will enhance on the ongoing solicitor - client relationship, if the lawyer is retained. Clarity about ethical and professional rules governing all lawyers will also assist in establishing realistic client expectations.[24]

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[19] The test of capacity has to be related specifically to the task being performed: *Re J.J.* [2003] NSJ No. 284 (NSSF), aff'd 2005 SCC 12.

[20] *Legal Ethics and Professional Conduct Handbook*, Rule 15

[21] *Legal Ethics and Professional Conduct Handbook*, Rule 18

[22] *CLIA Loss Prevention Bulletin* # 70, November 1994. *Miglin* 2003 SCC 24

[23] Also see: Non-Adversarial Dispute Resolution, *infra*.

[24] "Not every lawyer suits every client" *CLIA Loss Prevention Bulletin* #109, November 1999

The lawyer should be knowledgeable about alternative dispute resolution options to a degree sufficient to advise the client of the characteristics of each and factors that may preclude or recommend an option in the particular circumstances of a client.[25]

Potential problem files

While the lawyer has a duty to make "legal services available to the public in an efficient and convenient manner", the lawyer also has a duty to manage practice as a whole in a manner that properly serves all existing clients.[26]

The complexity of a file or the high demands or expectations of a prospective client should be assessed during the initial consultation and the early stage of the retainer.[27] Some indicators[28] of difficult files include:

1. the prospective client's expectation that "my case" will take priority over all other cases, whether or not due to the real or perceived urgent nature of the case;

2. the prospective client has had other lawyers and has been dissatisfied with their efforts;

3. the prospective client has unrealistic expectations about matters such as the lawyer's response time, legal opinions are treated as guarantees of results, excessive or unrealistic demands are made on staff;

4. the prospective client refuses to follow advice or recommendations, refuses to accept legal opinions, demonstrates a motivation to abuse the process to antagonize the other party, gives inappropriate instructions, or quickly complains regarding representation; or

5. the prospective client refuses to pay or delays in paying a retainer, makes challenges to the retainer agreement or complains about fees.

The lawyer should consider carefully the potential pitfalls in acting for a family member or friend. While the desire to offer assistance may be strong, the existing relationship could hamper the lawyer's objectivity, professional advice and the client's instructions, as well as fee

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[25] Alternate dispute resolution options include: negotiation (alternatives include: negotiation between the lawyers, negotiation between the parties themselves with the lawyers assisting, or four-party conferences where both parties are present with their own counsel), collaborative family law, mediation, arbitration, conciliation, settlement conferences and litigation. Also see: Non-Adversarial Dispute Resolution *infra*.

[26] *Legal Ethics and Professional Conduct Handbook*, Rule 15

[27] Law Society of Upper Canada, Practice Management Advisory Tips "Retainer/Difficult Clients".

[28] *CLIA Loss Prevention Bulletin* #43, November 1993. "Beware the dangers of acting for family and friends", Dan Pinnington, *National General Practice, Solo & Small Firm Conference Newsletter*, December 2003. Also see: Conflicts, *infra*.

arrangements. Outcomes including un-met expectations could affect the ongoing relationship as well.[29]

Possibility of reconciliation

The lawyer has a positive duty under the *Divorce Act*[30] to discuss the possibility of reconciliation and to make referrals to marriage counselling or therapy where appropriate. This may occur as early as the initial consultation. Lawyers should be aware of the resources available in the community to assist individuals in these circumstances.

Urgent or emergency matters

The lawyer should assess the immediacy of the client's needs and ensure that there is sufficient time in the lawyer's schedule to accommodate preparation for and participation in an urgent or emergency court appearance.

Domestic violence

The lawyer should be familiar with the issues surrounding domestic violence, and the impact it has on the client, such as fear, loss of self-esteem, difficulty absorbing information or making decisions[31] and the impact on the client's family as a whole. The lawyer should be aware of the community resources available to assist families dealing with domestic violence. This information allows the lawyer to:

1. assist the client in developing a safety plan[32] when required;
2. assess the appropriate dispute resolution option for the case[33]; and
3. advise the client on accessing and using resources, such as support groups, transition houses, supervised access programs, counselling services and programs, local police detachments, peace bond applications and the *Domestic Violence Intervention Act.*[34]

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[29] "Beware the dangers of acting for family and friends", Dan Pinnington, *National General Practice, Solo & Small Firm Conference Newsletter*, December 2003. Also see: Conflicts, *infra.*

[30] R.S.C. 1985 (2nd Supp.) c. 3, s. 9

[31] *McClenahan* v. *Clarke* [2004] O.J. No. 750 (SCJ)

[32] Safety plans may include: escape plans, notifying the police of potential reactive behaviour, legal proceedings and identifying alternative living arrangements for an interim period.

[33] Mediation or settlement conferences, for example, may not be appropriate where a significant imbalance of power exists as a result of domestic violence.

[34] S.N.S. 2001, c. 29

The client may not freely disclose domestic violence for many reasons, such as fear of the consequences (real or perceived) of making the disclosure or the client may not recognize the circumstances as abusive. The lawyer should develop a series of questions regarding domestic violence as part of the initial interview. The questions should seek out the manifestations of abuse, including: physical or sexual assault; psychological and verbal abuse; controlling behaviour; harassment; intimidation and threats; confinement; extreme possessiveness; excessive jealousy; threatened or actual kidnapping or harm to children, pets or property; suicidal behaviour; damage or destruction of property; removal or withholding of basic necessities; threats to immigration status; and restriction of freedom of movement or contact with others. A history of police involvement, including criminal charges, restraining orders or undertakings, or prior use of transition housing or shelters should also be explored.

The lawyer has a duty to report cases to the Department of Community Services (or its agent) where a child may be in need of protective services pursuant to *Children and Family Services Act*.[35] Where the lawyer is satisfied that the matter has been fully reported, then a further report may not be required, however care should be exercised in determining that the duty has been discharged.

Involvement of other parties connected to the client

There may be other persons who intend to be directly involved with instructing the lawyer on the conduct of the client's case.[36] These may include relatives, friends, new partners or representatives from support groups or programs. These persons may be paying for the legal services provided to the client. Clear boundaries must be established.[37] This should be done first with the client alone and then carefully explained to the other person in the presence of the client. Comments should be re-confirmed to each of them in writing by the lawyer.

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[35] S.N.S. 1990, c. 5, s. 23. Also see: Children, *infra*.

[36] American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, Code # 2.6

[37] *McClenahan* v. *Clarke* [2004] O.J. No. 750 (SCJ)

Confirmation of Retainer

Following the initial contact and consultation with the prospective client, the lawyer should determine within a reasonable time whether to accept the client's retainer.[38]

If the lawyer is declining the retainer, the lawyer should advise the client as soon as possible, in writing, that neither the lawyer nor the firm will represent the client in the matter. The client should be warned of impending problems or deadlines, and any materials received from the client should be returned with the letter declining the retainer.[39] If the lawyer obtained any confidential information from the client during the screening or consultation process, the lawyer cannot represent any party adverse to the declined client on any related matter.[40] This information should be maintained in the lawyer's conflict system.

If the lawyer accepts the client's retainer, the lawyer will confirm, in writing, all of the important details respecting the terms of the retainer, particularly the following:

1. identifying who the client is (including other names previously or alternately used) and who will be providing instructions;[41]
2. the scope of the retainer, including the services which the lawyer is being retained to provide, and whether other lawyers, the client or other professionals will be responsible for providing other services relating to the matter;
3. payment of legal fees, including the basis for calculating fees, timing and method of payment, and consequences of client's failure to honour the terms of the fee arrangement (i.e. withdrawal of legal services);[42]
4. circumstances where other experts, professionals or service providers will be consulted or retained on behalf of the client, confirmation from the client that confidential information may be shared with these third parties, and confirmation of responsibility for payment for such services;
5. outlining the risks of proceeding with the client's instructions, including the chances of success and the legal and financial consequences of winning or losing the case;[43]
6. clarifying whether representation will continue beyond trial or settlement of the issue (i.e. enforcement of judgment, appeal); and
7. confirming client's instructions to proceed with legal representation.

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[38] Also see: Client Screening, Initial Contact and Conflict of Interest, *infra*.

[39] Nova Scotia Barristers' Society *Loss Prevention Bulletin*, Numbers 43 and 54

[40] Nova Scotia Barristers' Society *Loss Prevention Bulletin*, Number 43

[41] *McClenahan* v. *Clarke* [2004] O.J. No. 750 (SCJ)

[42] Also see: Fees, *infra*.

[43] *CLIA Loss Prevention Bulletin*, # 43, November 1993.

Canadian courts have frequently stated that the lawyer who provides legal services without a written retainer from the client proceeds at peril for, in the absence of a written retainer, the client's evidence respecting the lawyer's authority and responsibilities will be given greater weight than the lawyer's.[44]

A written retainer agreement is particularly essential where the scope of the lawyer's retainer is intended to be limited or where the lawyer is retained to carry out only specific instructions. Unless the scope of the retainer is specifically limited in clear and unambiguous language and has been agreed to by the client, a lawyer retained in a family law matter will be deemed to have accepted a general retainer to represent the client in the resolution of all legal issues arising out of the situation. Any ambiguity will be construed against the lawyer.[45]

The written retainer should specify the legal services which will be provided, including advising, counselling, drafting, negotiating, investigating, researching and bringing the matter to a final resolution, whether by negotiated settlement or trial. Depending on the case, the retainer agreement should also specify the particular family law issues to be resolved, such as custody, access, support of spouse or children, valuation and division of assets, or costs.

If the scope of the retainer is limited and alternate counsel will be retained to represent the client with respect to other legal matters, the retainer letter should particularly specify those issues for which the lawyer will be responsible, and should, where circumstances require, confirm that the client consents to the lawyer's discussion of confidential information with the alternate counsel.[46]

If the client will be personally responsible for certain tasks, the client's responsibilities should be confirmed in writing.[47]

The lawyer should be aware that even where the scope of the retainer is limited, on the client's instructions, the lawyer still retains a duty to advise the client of potential risks associated with the client's course of action. This also applies where the client's limited instructions are unreasonable, unworkable or involve risks that will affect the successful resolution of the client's case. The lawyer is held to a standard of care based upon a reasonable knowledge of the law, the facts of the case and the practical implications of the results facing the client.[48] Accordingly, despite the existence of written instructions limiting the scope of the lawyer's retainer, the

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[44] *HRP Management Services Ltd* v. *Arab*, N.S.J. No. 322 (S.C.), *Lindsay* v. *Stewart, MacKeen and Covert* (1988), 82 N.S.R. (2D) 203 (A.D.). Also see: *CLIA Loss Prevention Bulletin* number 147, *McClenahan* v. *Clarke*, [2004] O.J. No. 750 (SCJ), *ABN Amro Bank Canada* v. *Gowling, Strathy and Henderson* (1994), 20 O.R.(3D) 779 (G.D.), "Scope of the Retainer", Robert W. Wright Q.C., Nova Scotia Barristers' Society *The Claims Wise Bulletin*, Issue No. 2, March 1992, number 21 and "Memo the File!!", *CLIA Loss Prevention Bulletin* Issue No. 10, Bulletin # 52, November, 1994.

[45] Also see: Communication and Confidentiality, *infra*.

[46] Also see: Communication and Confidentiality, *infra*.

[47] "How far does a retainer reach?" *CLIA Loss Prevention Bulletin,* Issue No. 23, Bulletin 90, December, 1998

[48] *Lenz* v. *Broadhurst Main* [2004] O.J. 288 (SCJ)

lawyer has an implied obligation at all times to exercise reasonable skill and care on behalf of the client.[49]

[49] *Mardling* v. *Malvern* [1983] O.J. No. 212 (H.C.)

Conflict of Interest

A conflict of interest undermines the lawyer's ability to fulfil duties owed to the client. A conflicting interest is one that "would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client."[50] Conflicting interests may arise because of personal interests or the interests of others to whom the lawyer owes a duty.

Anticipating the possibility of a conflict is crucial to preventing a conflict from arising. The lawyer should maintain a system to identify and avoid conflicts.

The unrepresented party[51]

Where a party is not represented by counsel, at the earliest opportunity, the lawyer should inform that party, in writing,[52] as follows:

1. I am the lawyer for the first party.

2. I do not and cannot represent you.

3. I will at all times look out for my client's interests, not yours.[53]

4. I will tell my client everything you tell me.

5. My communications with you about this case are negotiation on behalf of my client. My communication with you is not advice to you as to your best interest.

6. I will treat your "without prejudice" letters or materials as confidential only where they are truly without prejudice settlement communications.

7. I urge you to have your own lawyer.

8. At times, I will be required to send you letters and other written materials. To do so, you must tell me how I can reach you in a manner that is timely and confidential.

Where a party is not represented by counsel, it is particularly important to communicate this message, if the unrepresented party might reasonably feel entitled to look to the lawyer for

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[50] *Legal Ethics and Professional Conduct*, Chapter 6, Guiding Principle 1.

[51] Also see: Parties and Others without Counsel, *infra*.

[52] Also see: Documentation, Parties and Others without Counsel, *infra*.

[53] Duty on lawyer to advise unrepresented party that their interests are not being protected: *Hants County Business Development Centre Ltd.* v. *Poole et al.* (1998), 172 N.S.R. (2d) 393 (C.A.), aff'g (1997), 165 N.S.R. (2d) 393 (S.C.) *per* Kelly J.; *Klingspon* v. *Ramsay et al.* (1985) 1985 CarswellBC 228, 65 B.C.L.R. 132 (S.C.); *Kwak* v. *Odishaw* (1984), 59 B.C.L.R. 54 *per* Seaton J.A. (C.A.). Reliance of unrepresented party on the lawyer may result in a duty of care: *Tracy* v. *Atkins* (1979), 83 D.L.R. (3rd) 46 (B.S.C.S.), aff'd 105 D.L.R. (3rd) 632 (C.A.); *Elliott* v. *Hossack* 1999 CarswellBC 402 (S.C.); *Paton* v. *Shaw* (1995), 134 Nfld & P.E.I.R. 271 (P.E.I. T.D.)

guidance and advice.[54] Consider the situation where the lawyer represents a client in co-petitioning for divorce and the other spouse does not retain counsel.

Conflict of interest between clients

In being retained, a lawyer must determine no conflict of interest exists and the lawyer must maintain adequate means for identifying conflicts.[55]

As the "family lawyer", there may be a history of previously representing the couple,[56] the family business, and even extended family members[57] which places the lawyer in a conflict. To ensure there is no breach of the obligation to avoid conflict of interest when providing legal services using the Internet or email, the lawyer must determine the actual identity of the party with whom the lawyer is dealing.[58]

A lawyer should not represent more than one party, even if the parties do not wish to obtain independent representation. One party should be sent for independent legal advice.

While representing both parties is never recommended, if a lawyer chooses to act for more than one party, the *Legal Ethics and Professional Conduct Handbook* provisions on conflict of interest apply.[59]

Conflicts may arise when a lawyer moves between law firms.[60]

On occasion, a lawyer may be asked to represent a prospective client and the person with whom the prospective client is intimately involved, in their separate cases or where one is a likely

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[54] *Legal Ethics and Professional Conduct Handbook* - Commentary 7.1

[55] It is inappropriate to act for a client against a former client where information from the previous retainer may be used against the former client: *Francis* v. *Cook* 2004 SKQB 57

[56] Previous legal advice to a couple with regard to another legal matter may create a conflict of interest prohibiting the lawyer from acting against either party as an individual: *Card* 1997 CarswellNS 395, 161 N.S.R. (2d) 227 (S.C.); *Innes* v. *Ayadi* (1998) 169 N.S.R. (2d) 53 (F.C). While not proof of negligent conduct, accepting a retainer by one partner to act against the other, where both were previously represented shows "poor judgment": *McClenahan* v. *Clarke* 2004 [2004] O.J. No. 750 (SCJ).

[57] *Fisher* (1986) 76 N.S.R. (2d) 336, (A.D.)

[58] *Guideline on Ethics and the New Technology*, The Federation of Law Societies of Canada, November 1999

[59] *Legal Ethics and Professional Conduct Handbook*, Chapter 6, Impartiality and Conflict of Interest Between Clients.

[60] These are governed by the *Legal Ethics and Professional Conduct Handbook*, Chapter 6a Conflicts Arising as a Result of Transfer Between Law Firms.

witness in the other's case.[61] Joint representation may make it difficult to advise either of the need to recover from the emotional trauma of divorce, the desirability of a marriage contract or cohabitation agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other. As well, one client may desire to waive support payments, believing in the financial security of the new relationship. The inherent potential conflicts in attempting to represent both render such representation improper. Even when a client's new partner is not represented by the lawyer, but wishes to participate in consultations[62] and other aspects of the representation, the lawyer must be alert to the danger of a client's own best interest being undermined in an effort to accommodate the new relationship.

Conflict of interest between lawyer and client

A lawyer should not have a sexual relationship with a client, opposing counsel, or a judicial officer in the case during the time of the representation.[63] Persons in need of a family lawyer are often in a highly vulnerable emotional state. An intimate relationship may endanger both the client's welfare and the lawyer's objectivity.

Lawyers are expected to interact civilly and, even, cordially with each other.[64]

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[61] This can arise where individuals form new relationships with former clients: *Cooper* (1990), 65 Man. R. (2d) 254 (Q.B.).

[62] In *J.(C.L.)* v. *J.(D.E.)* 2003 BCPC 19, the wife sought to disqualify her current husband's law firm on the basis of a conflict. During an earlier divorce, the wife, in the company of her current husband whom she was then dating, consulted with another lawyer in the firm for to obtain a second opinion regarding property division. There was no confidentiality of information *vis à vis* current husband. No conflict in current parenting dispute and the application was dismissed.

[63] An excellent discussion of this occurs in *McWaters* v. *Coke* 2005 ONCJ 73 in which a wife's counsel (also her husband) was removed from the record. This decision is in the context of the Law Society of Upper Canada's *Rules of Professional Conduct.*

[64] It may be important to note for some who are unfamiliar with the language used by lawyers in court that it is customary to refer to opposing counsel as "my friend" or "my learned friend".

Fees

Fee letters

At minimum, at the earliest opportunity, the lawyer should tell the client, in writing,[65] the basis on which fees will be charged[66] and when and how the lawyer expects to be paid. The letter should explain responsibility for disbursements, especially the professional accounts of other individuals.[67] The fee letter should outline the consequences of the client's failure to pay the lawyer's accounts and the lawyer's withdrawal.

Retainer contracts

Ideally, the lawyer should provide the client with a written fee contract, outlining the obligations of the lawyer and the client and specifying the scope of the representation (particularly in cases where the client wants legal services to be "unbundled").[68] The retainer contract should deal specifically with the consequences of the client's failure to honour the contract, including the lawyer's withdrawal.

Retainer contracts should be presented in a way that allows the client an opportunity to consider the terms and obtain answers to any questions about the contract, including consulting with another lawyer if the client wishes, so the client may fully understand the contract before entering into it.

Accounts

The lawyer should provide statements of fees and disbursements on the basis agreed upon in the retainer contract or fee letter and on request. The account statement should be sufficiently detailed to inform the client of the basis for the fee, as permitted by the retainer contract or fee letter, and disbursements incurred.

As required by the circumstances, the degree of detail should respect confidentiality, if the account will be seen by a third party, such as the Canada Revenue Agency.

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[65] Lawyers have a duty to establish their retainers with clarity and to reduce the contract to writing. Without a written retainer, where there is a conflict between the evidence of the lawyer and the client as to the term of the retention, weight must be given to the version of the client, rather than the lawyer: *Lindsay* v. *Stewart, MacKeen & Covert* 1988 CarswellNS 231, 82 N.S.R. (2d) 203 (A.D.)

[66] *Legal Ethics and Professional Conduct Handbook*, Chapter 12 Fees

[67] Where the services of another professional (actuary, appraiser, accountant, etc) are required, the lawyer should ensure the contract for service is between the client and the other professional. Where the lawyer advances payment of such a disbursement it is not a loan from the lawyer to the client: this prohibition was found in s. 48D(3) of the Regulations to the *Barristers and Solicitors Act* R.S.N.S. 1989, c. (now repealed) and is now found in s. 4.3.3 of the Regulations to the *Legal Profession Act* S.N.S. 2004, c. 28.

[68] Also see Confirmation of Retainer, *infra*.

Security

When a lawyer obtains security for fees (through a promissory note or collateral mortgage, for example), the transaction should must be documented and occur at arms' length.

Fees

The lawyer's fee should be reasonable, based on appropriate factors.[69]

Contingency fees

Contingency fees can be proper in certain family law cases.[70] In other cases, the lawyer's duty may render a contingency fee inappropriate.[71]

Non-payment and withdrawal

A lawyer may withdraw from a case when the client fails to honour the retainer contract and there is no serious prejudice to the client.[72] Before withdrawing, the lawyer must take reasonable steps to avoid foreseeable prejudice to the rights of the client, allowing time for employment of other counsel, and delivering to the client papers and property to which the client is entitled and which are not subject to lien by the lawyer.

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[69] *Legal Ethics and Professional Conduct Handbook*, Chapter 12 Fees; Civil Procedure Rule 63.16 enumerates the factors to be considered in determining a lawyer's reasonable compensation.

[70] *Legal Ethics and Professional Conduct Handbook*, Chapter 12 Fees, Civil Procedure Rules 63.17 - 63.20 A dispute over the characterization of assets, for example, would be the appropriate subject of a contingency fee agreement.

[71] For example, where a contingency fee may create a financial incentive for the lawyer to ensure that reconciliation does not occur, this is contrary to the lawyer's duty, pursuant to s. 9(1) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, to promote the prospect of reconciliation of the spouses.

[72] *Legal Ethics and Professional Conduct Handbook*, Chapter 11 Withdrawal. A retainer contract is preferred to a fee letter for its acknowledgment of the lawyer's entitlement to withdraw.

Documentation

A lawyer should document:

1. advice to the client, noting the information on which it is based[73], including explanations of risks[74] and confirmation of the explanations;

2. terms of the lawyer's retainer, including instructions limiting the lawyer's retainer;[75]

3. instructions received from the client, instructions arising out of the lawyer's advice and, in particular, instructions which are contrary to the lawyer's advice;

4. termination of retainer;[76]

5. undertakings and trust conditions;[77]

6. any transaction whereby the lawyer's fees are secured and the accompanying independent legal advice;[78] and

7. all material communication with a party who is without counsel.[79]

The minimum level of documenting the lawyer should prepare is a memorandum to the file.[80] Of greater utility is written confirmation that is sent to the client or other party involved in the communication. Of greatest utility is written communication which is confirmed in writing as

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[73] The lawyer should note information that is corroborated, information which emanated from the client and information which was not available, so limitations on the advice are apparent.

[74] Duty to explain risks, obtain written instructions: *Edmond & Associates* v. *Angelatos* (1997), 120 Man.R. (2d) 70 (Q.B.), *Credit Foncier* v. *Grayson, Rushford* (1987), 54 Sask.R. 203 (Q.B.)

[75] Absent documentation, client's recollection of scope of retainer preferred over lawyer's: *Bergman* v. *Williams* (1980), 22 B.C.L.R. 317 (S.C.), *ABN Amro Bank Canada* v. *Gowling, Strathy & Henderson* (1994), 20 O.R. (3d) 779 (Gen.Div.). Failure to document advice, scope of retainer not conclusive: *669283 Ontario Ltd.* v. *Reilly* [1996] O.J. No. 273 (Gen. Div.), *Hants County Business Development Centre Ltd.* v. *Poole et al.* (1997), 165 N.S.R. (2d) 365 (S.C.), (1998), 172 N.S.R. (2d) 393 (C.A.). See also *Lenz* v. *Broadhurst Main* [2004] O.J. No. 288 where the scope of the retainer limited the lawyer's responsibility (aff'd 2005 CarswellOnt 4416; Ontario Court of Appeal, CA C41431, September 16, 2005).

[76] Also see: Termination of Retainer, *infra.*

[77] *Legal Ethics and Professional Conduct Handbook*, Duties to Other Lawyers Chapter 13, Commentary 13.7

[78] Also see: Fees, *infra.*

[79] Also see: Conflict of Interest, Unrepresented Parties, *infra.*

[80] *Mazerolle* v. *Maynes* [2000] N.B.R. (2d) (Supp.) No. 5 (Q.B.)

having been received and accepted or a document which has been countersigned by the recipient. This is particularly useful when communicating with a party who has no lawyer.

Written communications to a client should use plain language that is appropriate to the client's literacy, fluency and vocabulary.

Documentation should consistently reflect the date it is prepared, the event being recorded (a meeting, telephone call, court appearance), and the individuals present.[81]

When writing to a party without counsel, it is helpful to note that the written communication will be assumed to be correct, unless the individual specifically identifies errors and communicates those errors and their corrections within a certain period of time.

When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client's signature evidence of the client's instructions. The lawyer may wish to note the client's questions and information on a file copy of the document the client has signed.

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[81] When preparing notes and correspondence with parties or individuals without counsel, appreciate that they are "postcards" which may be read by any number of unintended individuals. Correspondence may come to be read by our insurer and defence counsel, the Complaints Investigation and Formal Hearing Committees of the Nova Scotia Barristers' Society and the Court.

Communication and Confidentiality

The lawyer - client relationship

The lawyer - client relationship is built on mutual confidence which enables candid disclosure, advice and instruction.[82] At any time, a client may forsake confidentiality. The lawyer may not make confidential information known, and may only disclose privileged information acquired as a result of the professional relationship where the client has explicitly or implicitly authorized the disclosure, where the disclosure is required by law[83] or permitted or required by the Legal Ethics and Professional Conduct Handbook.[84] The duty to maintain confidentiality includes the duty not to disclose that an individual has consulted or retained the lawyer and this must be carefully managed where two (or more) parties seek to retain the same lawyer.[85]

Often a client may wish to bring a family member, new partner or friend to meetings with the lawyer to offer support to the client. A support person may offer useful assistance to the client. The lawyer should be mindful of the prospect that the participation of a support person may be counter-productive to developing a strong solicitor-client relationship. The client should be made aware that the presence of another person does waive privilege with regard to discussions at which the other person is present. Determine whether the other person is likely to be a witness to ensure that testimony cannot become distorted by the support person's exposure to legal advice. If the support person is a new partner, take care to ensure the client's own interests are not at risk of being subordinated to the new relationship.[86]

Written communication

The lawyer's written communication with the client should be in plain language that is appropriate to the client's literacy, fluency and vocabulary and the communications should be timely.[87]

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[82] Confidential communication refers to those communications which are made in circumstances which show that the speaker intended the statement only for the person being addressed. Privileged communications are those communications made between individuals in a protected relationship, such as the solicitor-client relationship, which are sheltered from forced disclosure in Court at the option of the client.

[83] See, for example, *Stewart McKelvey Stirling Scales* v. *Nova Scotia Barristers' Society* 2005 NSSC 258

[84] *Legal Ethics and Professional Conduct Handbook*, Chapter 5

[85] *Legal Ethics and Professional Conduct Handbook*, Chapter 5, Commentary 5.2

[86] Also see: Conflict of Interest, *infra*.

[87] *The Report of the Competency Task Force*, Nova Scotia Barristers' Society 2000 stated, at 18, "The practice of family law, by nature, has always been emotional and rife with conflicts. The practice has become even more taxing, for clients and legal professionals, where the conduct of lawyers deteriorates to the point of incivility."

A lawyer's communication with a client may become known to the opposing party when, for example, a client shares the communication. Lawyers should be careful to ensure that they are not, in this fashion, negotiating directly with a party who has retained counsel.[88]

Written communication between lawyers should be business-like and constructive. Correspondence should, at all times, be civil.[89] Even so, a client may interpret forceful letters between lawyers as extremely aggressive. The lawyer should explain the context in which steps occur, so the client does not misconstrue events.[90] Correspondence should aim to communicate information or advance the resolution of disputes, not to create upset or to antagonize. The lawyer should remain mindful that the parties may lack sophistication in legal matters and may not understand the tone or context of communications.

Electronic communications are increasingly popular. When using the internet or email, the lawyer must determine the actual identity of the party with whom the lawyer is dealing and use reasonably appropriate means to minimize the risk of electronic communications being disclosed or intercepted.[91] Some information may be so sensitive that electronic communication, without encryption, is inappropriate and, in those cases, where encryption is not available, electronic communication should be foregone in favour of a more secure communication. Clients should be cautioned against forwarding emails from a lawyer to the other party or from the other party to the client's own lawyer. Lawyers, too, should only forward such communications from a client to opposing counsel with the client's consent

General

It is inappropriate to offer personal disparaging opinions on the behaviour of a client's spouse or partner.[92]

Certain elements of our communication with our clients will, necessarily, become known to non-parties. For example, where a deduction is claimed for legal fees relating to actions for

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[88] *Legal Ethics and Professional Conduct Handbook*, Chapter 13, Commentary 13.12

[89] Nova Scotia Barristers' Society Task Force on Civility 2002 Report. *Legal Ethics and Professional Conduct Handbook*, Chapter 13, Commentary 13.17.

[90] For example, personal service of a divorce petition is not preferred, but it may occur where the opposing party is not responsive. See: *MacLennan* 2001 SFSND1206-3776: "It is not appropriate to serve a Divorce Petition on a party at the work place. This should only be done if the party is evading service. Sufficient to say, it would do little to enhance an alternate dispute resolution if this is the manner in which proceedings start."

[91] *Guidelines on Ethics and the New Technology,* Federation of Law Societies of Canada, November 1999.

[92] Solicitors' Family Law Group (United Kingdom). *Legal Ethics and Professional Conduct Handbook*, Chapter 13, Commentary 13.1.

support[93], it is preferable to provide the client with a letter certifying the legal fees and disbursements which may be claimed, rather than requiring the client to provide a copy of an itemized account (which may disclose confidential information) to the Canada Revenue Agency. Similarly, if a non-party is receiving and paying the client's accounts, it may be appropriate to provide an account which is similarly devoid of confidential information.

Giving effect to certain elements of agreements or orders may require that non-parties, such as employers, pension administrators, insurance companies or financial institutions, receive copies of the agreement or order. For example, the requirements of s. 146(16) of the *Income Tax Act* and Form 2220(E) compel parties to provide a copy of the Order or agreement to divide registered retirement savings plan contributions. Consideration should be given to providing discrete (and discreet) orders or agreements in such situations, which will avoid disclosing details of parenting or support to non-parties to whom the information is irrelevant. Similar concerns arise in designating life insurance beneficiaries and dividing pensions.

If the client retains new counsel, the lawyer should receive the client's consent before communicating with the new lawyer. The new lawyer may wish to receive consent to discuss the file with the previous lawyer when deciding whether to become retained.[94]

Third parties may seek confirmation of financial information from the lawyer: banks and financial institutions may want information about support obligations or entitlements; child care providers, educational institutions and student loan agencies may want information to support applications for financial assistance. The lawyer should obtain permission to provide this information and should review the information which is to be provided with the client, prior to making the information available.

When requests for information are made of third parties; these, too, should respect confidentiality. The client's consent for the disclosure should be provided and no greater information relating to the request should be offered than necessary.

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[93] Changes to IT-99R5 to bring it into accord with the decision in *Gallien* v. *R.* were announced by Release #24 (October 24, 2002). Also see: *Rabb* v. *R.* 2006 TCC 140

[94] "The Problem Client: Nightmare on Elm Street", *CLIA Loss Prevention Bulletin* Issue Number 7, November 1993, Bulletin #43

Unrepresented Parties

The lawyer has a duty to treat and deal with other lawyers courteously and in good faith.[95] The lawyer is required to apply this rule when dealing with an individual who is without a lawyer. [96]

The lawyer must remember, when dealing with anyone who lacks representation, that the lawyer shall:

1. Remain objective, avoid personal animosity toward and disparaging remarks about or to the unrepresented party;[97]

2. Avoid sharp practice by not taking advantage of or acting without fair warning on slip-ups, irregularities or mistakes made by the unrepresented party, that do not go to the merits of the case or do not result in any sacrifice or prejudice of the client's rights;[98]

3. Adhere to the Rule respecting the use and possession of documents belonging to or intended for the unrepresented party, and which are not intended for the lawyer to see;[99]

4. Accede to reasonable requests for adjournments, trial dates, waiver of procedural formalities and any similar matter that does not prejudice the rights of the client;[100]

5. Respond with reasonable promptness to any communication from an unrepresented party that requires an answer and to be punctual when fulfilling a commitment;[101]

6. Strictly and scrupulously fulfill any undertaking given, and honour any trust conditions once accepted. It is particularly important when dealing with unrepresented parties that the particular terms of the undertaking or trust condition be confirmed in writing and be written in unambiguous terms.[102]

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[95] *Legal Ethics and Professional Conduct Handbook*, Chapter 13

[96] *Legal Ethics and Professional Conduct Handbook*, Chapter 13, Rule 13.13.

[97] *Legal Ethics and Professional Conduct Handbook*, Rule 13.1

[98] *Legal Ethics and Professional Conduct Handbook*, Rule 13.2

[99] *Legal Ethics and Professional Conduct Handbook*, Rule 13.2(a)

[100] *Legal Ethics and Professional Conduct Handbook*, Rule 13.3

[101] *Legal Ethics and Professional Conduct Handbook*, Rule 13.5

[102] *Legal Ethics and Professional Conduct Handbook*, Rules 13.6, 13.7, 13.8, 13.9 and 13.16

While the lawyer may provide an undertaking to a party who is unrepresented, undertakings should not be accepted from an unrepresented party nor should property be transferred to an unrepresented party, if the transfer is subject to that party fulfilling trust conditions. The conduct of the unrepresented party is not governed by the Nova Scotia Barristers Society and the unrepresented party has no obligation to adhere to the Legal Ethics and Professional Conduct Handbook.

The lawyer is required to be openly and necessarily partisan respecting the best interests of the lawyer's client and is not obliged, except as required by law or by the *Legal Ethics and Professional Conduct Handbook,* to assist the unrepresented party or advance matters derogatory to the client's case.[103]

The lawyer has a duty to avoid resorting to frivolous or vexatious pre-trial procedures including discovery objections, trying to gain advantage from slip-ups or oversights that do not go to the real merits of the matter or tactics which will simply delay, harass or impose expensive hardships on unrepresented parties.[104]

The lawyer shall at all times be courteous and civil to the unrepresented party when involved in adversarial proceedings.

Legal advice

The lawyer should urge an unrepresented party to obtain legal representation or, at the very least, independent legal advice. The lawyer should always be careful to avoid leaving an unrepresented person with the impression that the lawyer is giving the legal advice or is in any way looking out for or protecting the best interests of the unrepresented party.[105]

Alternative dispute resolution

When acting against an unrepresented party, the lawyer should give due consideration to the appropriateness of alternative dispute resolution procedures.[106] This is especially the case in matters that might otherwise have to be litigated, as the unrepresented party will not be familiar with the formalities of evidence, procedure and the Civil Procedure Rules.

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[103] *Legal Ethics and Professional Conduct Handbook* - Rule 13.14

[104] *Legal Ethics and Professional Conduct Handbook* - Rule 13.15

[105] *Legal Ethics and Professional Conduct Handbook*, Chapter 4, Rule 4.20; Also see: Conflict of Interest *infra.*

[106] *Legal Ethics and Professional Conduct Handbook* – Rule 10.2A

Duty to the court

The lawyer should be cognizant of Chapter 14, including the rules and guiding principles associated with a lawyer's duty to the Court.[107]

Communication

The lawyer should take all practical steps to reduce or eliminate miscommunication and misunderstanding between the lawyer, the unrepresented party or unrepresented third parties, by confirming information in writing.

Where practical, the lawyer should avoid material verbal conversations with the unrepresented party or unrepresented third party. Where verbal conversations are required, consider whether it would be appropriate to have a witness present or to tape the conversation. In all circumstances, the substance of the conversation should be immediately confirmed in writing.[108]

Communicate to the unrepresented party in plain language that is appropriate to the individual's literacy, fluency and vocabulary.

Determine in advance an agreed method for general correspondence and urgent or emergency communications and confirm these arrangements in writing.

Provide a written explanation of the concept "without prejudice" communications and state that Communications which are not settlement-oriented may be disclosed to the Court.

Trial

The lawyer should be aware of the Court's duty to ensure that an unrepresented party in a court proceeding is made aware of the right to retain a lawyer and is given full opportunity to do so, if he or she so wishes.

The lawyer should be aware that it is incumbent for the judge, and it is in the best interests of the lawyer's client, to explain the rules of evidence and procedure to the unrepresented party, and give the unrepresented party a full opportunity to present its case at trial.[109] However the sense of fairness and understanding that is granted to an unrepresented party does not extend to the degree where judges do not give effect to the existing law, or permit the issue of fairness to an unrepresented party to override the rights of a represented party.[110]

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[107] *Legal Ethics and Professional Conduct Handbook*, Chapter 14

[108] See also: Conflict of Interest, Documentation, *infra*.

[109] *Gordon* v. *Murphy* [1986] N.S.J. No. 467 NS CoCt. More recently, see *Family and Children's Services of Cumberland County* v. *M(D.M.)* 2006 NSCA 75.

[110] *Smith* v. *Herron* [2002] N.S.J. No 516 NSSC

It is also incumbent upon the Court to advise the unrepresented party that he or she will be held to the same standards of law associated with evidence, procedure and costs, especially if the unrepresented party unduly delays, complicates or protracts the legal proceedings.[111]

The lawyer should advise the client of the extra time and legal costs that can often be expected when the other party is not represented by counsel, as well as all of the ethical duties and responsibilities that apply to both the Court and the lawyer when dealing with an unrepresented party in court proceedings.

Negotiated agreements

When negotiating agreements, the unrepresented party must obtain independent legal advice and execute a certificate confirming that they have obtained such advice prior to executing their consent to the agreement, otherwise the lawyer may expose the client to a plethora of potential problems if the validity of the agreement is challenged in future. The threshold for determining whether the agreement is invalid is low if one party does not obtain independent legal advice, and any agreement that is challenged on that basis will usually be set aside.[112]

The lawyer must provide full disclosure to the unrepresented party prior to the execution of final minutes of settlement. Failure to provide full disclosure is equally grounds for setting aside the agreement if it is subsequently challenged. In other words, it is essential to make sure that the unrepresented party enters into the agreement and the negotiations with "eyes wide open".[113]

If the unrepresented party refuses to obtain independent legal advice, a lawyer should keep careful written notes respecting that fact and should endeavour to have the unrepresented party sign a waiver of Independent legal advice prior to executing any written agreement.

Children and other unrepresented individuals

When the lawyer is involved with matters affecting children or where the children are involved in Court proceedings and are not directly represented by counsel, the lawyer should be mindful that the unrepresented party may not adhere to the same standards through the negotiations or trial process.[114]

A lawyer has a duty to avoid taking unfair advantage of unrepresented third parties by misrepresenting the law, or by circumventing proper rules and procedures that may be unknown to the unrepresented individual.

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[111] *Per* Justice Scanlan in Chambers in *Graham*, March 2, 2004

[112] *Rogerson* [2004] NSJ No.152 (S.C.) applying *Miglin* 2003 SCC 24

[113] *Rogerson* [2004] NSJ No.152 (S.C.)

[114] Also see: Children, *infra.*

Non-Adversarial Dispute Resolution

The lawyer has an ethical duty[115] to advise and encourage fair and reasonable settlement and, in some cases, a statutory duty[116] to discuss with clients the advisability of negotiating corollary matters and the availability of resources that will assist, describing the dispute resolution techniques of mediation, collaborative family law, arbitration, conciliation, judicial settlement conferences and negotiation which may be appropriate for the client and their availability through the court, Employee Assistance Plans or private means. The lawyer should have sufficient knowledge of these techniques to understand the characteristics and appropriateness of each for a particular client.

The parties' past history and current relationship may limit the appropriateness of certain dispute resolution techniques. As well, the resolution of certain issues may require recourse to the court.[117]

In negotiating issues relating to children, the lawyer has a statutory duty to report when a child is in need of protective services.[118]

During negotiation sessions, the relationship among lawyers and the parties should be respectful and constructive. Negotiations must consider the current and future circumstances of the parties and redress any power imbalance which may exist between the parties.[119]

Negotiating with individuals who act on their own behalf must be undertaken with special care as to the individual's understanding of the nature of the discussion and the terms of offers. Documentation is essential. Legal advice must be recommended.

The lawyer must be satisfied the client is able to instruct. If the client's competence has an impact on settlement discussions, the lawyer must be clear of the extent of the lawyer's authority to settle a matter on behalf of the client and make that known to the opposing lawyer or party, while respecting the client's confidentiality.

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[115] *Legal Ethics and Professional Conduct Handbook*, Chapter10, The Lawyer as Advocate, commentary10.2

[116] *Divorce Act*, R.S.C. 1985 (2nd Supp.) c. 3, s. 9(2) and (3)

[117] The clearest example is obtaining a divorce: parties cannot negotiate a change to their marital status. Other relief may be available only as a result of a court order. Where a client is not competent to instruct counsel, court's involvement will be required pursuant to Civil Procedure Rule 6.07.

[118] *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 23(1). The duty exists regardless whether the information is confidential or privileged.

[119] A power imbalance between parties can be vitiated effectively by the assistance of counsel: *Coady* v. *Osberg* 2004 NSSC 127

The lawyer must be aware of the requirements of a settlement which will withstand judicial scrutiny and to satisfy those requirements in the process of negotiation.[120]

In all cases, the lawyer must make clear any limits on the lawyer's authority to settle.[121]

Misunderstandings should be corrected immediately and ought not to be relied upon.[122]

Where negotiation occurs in writing, the client ought to review and approve every settlement offer prior to its being made to the other party or counsel. If that is not possible, offers should clearly state that they are subject to the client's review and approval.

Settlement offers are without prejudice unless stated to be otherwise. Settlement documents should outline the information exchanged and, in the absence of disclosure, may make material non-disclosure a basis for variation. Any deadline on an offer should be clearly stated.

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[120] *Miglin* 2003 SCC 24 addresses this issue in the context of the *Divorce Act*. It allows that the Court may set aside the terms of an unimpeachably negotiated contract only where the contract fails to be in substantial compliance with the *Divorce Act*, including the equitable sharing of the consequences of marriage breakdown, finality and certainty. Analysis includes considering whether the circumstances of negotiating the contract require the contract to be discounted. The Court declined to provide a definitive list of circumstances which would discount an agreement, but did list, in ¶ 81, the conditions of the parties, any circumstances of oppression, pressure or other vulnerability, taking into account all of the circumstances including s. 15.2(a) and (b) of the *Divorce Act* and the conditions under which the negotiations were held, such as duration and whether there was professional assistance.

[121] *Scherer* v. *Paletta* (1966), 57 D.L.R. (2d) 532 (Ont. C.A.); *Landry* (1981) 48 N.S.R. (2d) 136 (A.D.); *Thibodeau* (1984) 65 N.S.R. (2d) 442 (T.D.); *Canada* v. *Veinotte* (1987) 81 N.S.R. (2d) 356 (T.D.).

[122] *Deluney* 2004 NSCA 72. *Legal Ethics and Professional Conduct Handbook*, Chapter13, Duties to Other Lawyers, commentary13.2.

Children

The lawyer needs to give careful consideration to dealing with family law files where children are involved. The lawyer must competently represent the client's interest, while recognizing the unique legal duties owed to a child.[123]

The lawyer's duty to protect the interests of children should be considered from a number of different perspectives including: statutory duties; ethical duties; and fiduciary duties.

Statutory duties

A lawyer must inform the client of mediation facilities and other alternate dispute resolution options the lawyer knows that might assist the parties in negotiating the settlement of child custody and support issues.[124]

A lawyer should advise the client who is a parent that, subject to applicable legislation, the mother and father of the child are joint guardians and are equally entitled to the care and custody of the child and that this is independent of financial arrangements.[125] The lawyer should also advise the client of the statutory duty to provide financial support for a child.[126]

Clients should be advised of their statutory duty to report cases of suspected circumstances where a child is in need of protective services.[127]

Section 23(1) of the *Children and Family Services Act* states that every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services, must immediately report the information to the Agency.[128] This requirement applies to lawyers, but it is unclear whether the legislation overrides privilege.[129] In avoiding the

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[123] Consider those, outlined below, pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5.

[124] *Divorce Act* R.S.C. 1985, (2nd Supp.) c. 3, s. 9(2).

[125] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 18(4).

[126] *Maintenance and Custody Act* R.S.N.S. 1989, c. 160, s. 8: *J.C.* v. *C.F.* 2005 NSFC 13.

[127] A child in need of protective services is defined in the *Children and Services Act*, s. 22(2).

[128] *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 23 further outlines the duties to report and also contains restrictions on civil action and outlines the offence and penalty and limitation periods.

[129] In his 1991 Annotation to the *Children and Family Services Act*, Professor D.A. Thompson describes the omission of lawyers from the list of individuals with a duty to report in s. 24(2) of the Act is "notable" He questions whether this section overrides solicitor-client privilege and notes that ". . . case law on solicitor-client privilege holds that, to be abrogated, the privilege must be clearly and expressly removed by statute." In *L.F. and C.F.* v. *C.A.S. of Halifax* (1984) 40 R.F.L. (2d) 402 (NS Co. Ct.), O'Hearn Co. Ct J. upheld the decision of Judge Niedermayer that the companion provision of the *Children's Services Act* did not abrogate the privilege where the parents' counsel claimed solicitor-client privilege for a report prepared by a psychiatrist he retained.

issue of privilege, the lawyer may wish to advise the client of the preference for a report to come from a parent, rather than a third party. A child need not be physically harmed, or in danger of same, for this duty to arise.[130] It should be especially noted that reporting of information that is not done "falsely or maliciously" is exempt from any right of action.[131]

The lawyer should also remind the client of the client's duty to report information that a child may be subject to third party abuse - inflicted by someone other than a parent or a guardian.[132]

The lawyer should advise the client of the strict requirement not to make malicious reports against another parent or third party and consider withdrawing if the client does so.[133] In particular, the lawyer should advise the client that a complaint to a child protection Agency, if dubious or untrue, is not a good way to strengthen a custody case[134] and may subject the child to the child protection process.

The lawyer should advise the client of the court's statutory duty to satisfy itself that reasonable arrangements have been made for the support of the child[135] and to disregard any provisions of a marriage contract or separation agreement affecting a child where it is in the best interests of a child to do so.[136]

Parent Information Programs are available throughout Nova Scotia and the lawyer should inform the client of the availability of the program and the obligation to attend, where Civil Procedure Rule 70 applies. The lawyer should also advise the client of the consequences of not attending the program.[137]

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[130] The definition of "suffer abuse" is contained specifically in *Children and Family Services Act* S.N.S. 1990, c. 5, s. 24(1) as falling within the meaning of s. 22(2) (a), (c), (e), (f), (h), (i), or (j).

[131] No right of action lies against the person doing the reporting – but note *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 24(8) which provides a penalty for any person who falsely and maliciously reports information to an Agency.

[132] *Children and Family Services Act* S.N.S. 1990, c. 5, s. 25

[133] See *Children and Family Services Act* S.N.S. 1990, c. 5, ss. 23(5), 24(8), 25(6). See also Wedsworth (2005), 229 N.S.R. (2d) 168 (SC) aff'd (2005), 229 N.S.R. (2d) 350 (CA) and *MacNeil* 2005 NSSC 275

[134] *Legal Ethics and Professional Conduct Handbook*, sections 4.7, 4.8, 4.11 and 4.12.

[135] See *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 11(1)(b) which is typically expansively interpreted to include provision for health, dental and life insurance and also arrangements for involvement of both parents in the child's upbringing and *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 10.

[136] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 26.

[137] Civil Procedure Rules 70.07(2) and (3).

Ethical duties

The lawyer must discuss with the client the advisability of negotiating a settlement particularly in matters of child custody and support.[138]

The lawyer has a duty not to file an affidavit which the lawyer knows to be inflammatory, exaggerated or deceptive and should advise the client of this duty.[139]

Fiduciary duties

The lawyer representing a parent should advise the client of the desirability of minimizing the impact of the separation or divorce on children. The lawyer should counsel a party to examine its wishes in light of the needs and interests of the children and the children's relationship with other family members. In so doing, the lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the familial relations endure.

A child does not benefit from involvement in its parents' divorce or separation. The lawyer and client alike should seek parenting arrangements that reduce or eliminate fractious contact between parents, minimize transition or transportation difficulties and preserve stability for the child.

Proper consideration of the child's welfare requires that the child not be used for leverage in legal proceedings related to the separation or divorce. The lawyer should negotiate parenting issues based solely on the considerations related to the child. The lawyer should caution the client against seeking to maximize time with the child solely for the purposes of paying less child support, seeking to minimize the time the child is with the other parent in order to maximize child support or to gain an advantage in the property division.[140] Once parenting issues are resolved, then child support should be determined based on appropriate financial considerations.

Obtaining information with respect to children

Where a child's input is relevant, the lawyer should not communicate with or interview a child. The lawyer should obtain this information in a manner that protects the child's best interests. A child's input can be obtained by a Guardian *ad Litem* or independent legal counsel for the child.

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[138] *Divorce Act* R.S.C. 1985, (2nd Supp.) c. 3, s. 9

[139] *Legal Ethics and Professional Conduct Handbook*, Chapter 14 and Commentary 10.2A. See also *Tkach* (1984) 147 N.S.R. (2d) 378 (TD)

[140] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160; s. 8 and *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, ss. 11, 13 and 23.

In Nova Scotia, children are rarely brought forward as witnesses in family matters or custody disputes.[141] Children should not be brought to court with the exception of uncontested adoption proceedings.

A lawyer should not call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child. At a minimum, this issue must be raised in advance at a pretrial conference.

Especially for older children, who are able to express a view or a desire to have their wishes known, it may be worthwhile to have their feelings brought forward in an appropriate manner which may be directed by the court. Generally this should only be considered in situations where the views of the child are in dispute.

In child welfare proceedings, a litigation guardian may be appointed for a child over the age of twelve.[142] There are currently no provisions elsewhere in Nova Scotia law for the appointment of a litigation guardian for any child outside of a child welfare proceeding, although the Supreme Court's *parens patriae* jurisdiction would enable it to appoint one for a child if it saw fit to do so.[143]

In the very rare circumstances where it is considered to be appropriate for a child to be involved in a non-adversarial form of dispute resolution, such as mediation, care should be taken to protect the child's interests and ensure the child's comfort. A child should not normally be involved in a round table mediation or discussion with parents if there are likely to be issues of conflict or a potential for exposure to inappropriate comments or discussions. Some consideration may be given to having the children heard through an individual session with a mediator, or another person qualified to interview children.

Should one of these options be appropriate, the following considerations should be discussed with the client:

1. Privacy - the child must be afforded the opportunity to speak privately with the interviewer;

2. The confidentiality and comfort of a child - respecting a child's wishes regarding disclosure of information to others;

3. Consent must be obtained from all parties (including the parents, the child and, in some cases, the Court) before the child's interview is conducted; and

4. The methodology must be clearly understood and agreed upon in advance.

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[141] While the father represented himself in *Ezurike* 2006 NSSC 73, there is judicial comment on the issue of advancing a child as witness.

[142] *Children and Family Services Act*, c. 37(2)

[143] Civil Procedure Rule 6

In Nova Scotia, the usual mechanism for obtaining a child's input in the court process is through an assessment. The lawyer should discourage the client from pursuing multiple psychological evaluations of a child and caution them that same may be counterproductive. Repeated psychological evaluations are contrary to the child's best interests.

When choosing an assessor, consideration must be given to the issues to be addressed and the needs to be met by the assessment. For example, are psychological tests or a psychiatric profile required? If so, care must be given to choosing a professional who has the qualifications to do this.

Reliance upon a jointly selected assessor may reduce the likelihood of competing assessments.

Parental alienation

Lawyers should advise their clients that attempts to sabotage the child's relationship with the other parent could result in serious consequences such as loss of custody and loss of contact with a child.[144]

Clients should also be advised that self-help remedies which disrupt the child's *status quo* are contrary to the child's best interests and lead to contravention of the provisions of the *Criminal Code*[145] and the *Hague Convention*.[146]

Clients need to be advised that, in many instances, they may be required to subordinate their own interests to those of their children and that they should seek parenting arrangements that eliminate conflict, minimize transitions and transportation difficulties and preserve stability for the children.

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[144] *Wedsworth* (2005), 229 N.S.R. (2d) 168 (SC) aff'd at (2005), 229 N.S.R. (2d) 350 (CA), *MacNeil* 2005 NSSC 275, *Jachimowicz* 2006 NSSC 82

[145] *Criminal Code of Canada* R.S.C. 1985, c. C-46

[146] *The Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35

Termination of Retainer

Conclusion of matter

The lawyers should only close files after all undertakings have been satisfied and matters relating to trust fund have been addressed (such as the return of the unused portion of the retainer and disbursement of settlement funds). The lawyer must provide a reconciliation of funds received and disbursed.

The lawyer should write a closing letter to the client, identifying the work that has been done to conclude the matter and any steps the client should take. For example, in a divorce, the client should be reminded that the lawyer will not make the application for a division of unadjusted Canada Pension Plan credits and the client should attend to this. The lawyer may leave to the client the task of filing a pension division order with the pension plan administrator. The lawyer should clearly advise the client that the lawyer's work is completed and, unless a further retainer is entered into, the lawyer does not continue to act for the client.

Client materials

The lawyer should return to the client any original documents provided by the client, documents provided by the other party, agreements originally signed by the client and the other party, and any court documents or pleadings that may not have been provided during the course of the retainer. The delivery of these items should be documented. The client should be advised that these documents may be required in the future, so they ought not to be destroyed but should be stored safely and securely.

Maintaining and storing file materials

In addition to those items which the lawyer should document,[147] the lawyer should store correspondence, including email, memoranda and notes relating to communications, providing advice and taking instructions, as well as draft and final versions of agreements as evidence of instructions and the course of negotiations.

The lawyer should determine how long the file should be stored.[148] In general, materials which are retained should be stored for a minimum of ten years. However, time periods will differ depending on the nature of the legal services provided. It may not be necessary to store a divorce file as long as a marriage contract file, where the marriage contract contains provisions applicable if the couple separates or applicable on the death of a spouse. The lawyer should advise the client how long a closed file will be stored and that it will be destroyed, in accordance with the lawyer's policy for file destruction, so the client does not depend on the lawyer to store the file indefinitely.

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[147] Also see Documentation, *infra*.

[148] The Practice Assistance Committee has developed Guidelines for File Closure, Retention and Destruction which are adapted for family lawyers in this section.

For divorce matters, where corollary relief is determined by the incorporation of an agreement into the Corollary Relief Judgment or where there is no corollary relief proceeding, the lawyer should keep copies of the pleadings, notes and correspondence.

For files involving parenting issues, the lawyer should retain pleadings, assessments and other professional reports, and any decision and order. If matters are resolved by consent, maintain background material relating to the settlement. The potential of an application to vary should inform the date chosen for destroying the file.

For matters involving the division of property, the lawyer should maintain correspondence, notes, Statements of Property, and supporting valuation documents. The potential of an application to set aside an agreement or an application to vary support, having regard to the unequal division of assets, will inform the destruction date of these file materials. Again, where matters are resolved by consent, maintain background material relating to the settlement.

For support matters, the lawyer should maintain correspondence, notes, Statements of Guideline Income, Statements of Special or Extraordinary Expenses, Statements of Expenses and Statements of Undue Hardship Circumstances and attachments. Where child support is not paid in accordance with the Guideline amount and for spousal support, materials relating to the determination of quantum should be maintained.

For files involving mentally incompetent adults, permanent retention of the file is recommended.

When representing private parties in child protection matters, complete file materials should be retained for a period of ten years. Thereafter, the lawyer should assess whether some materials ought to be retained for a further period, in light of the applicability of other provisions of the *Children and Family Services Act.*[149]

Marriage contract and cohabitation agreement files may be estate planning matters and should be maintained as one would maintain wills, with files retained permanently until probate has been closed.

Family law files may deal with income tax, corporate and real property matters. In income tax matters, the onus of proof is often upon the taxpayer to discredit an assessment which can best be done when the relevant documents are available. When tax documents and information are returned to clients, clients should be advised to keep the documents indefinitely and in a secure location. Those carrying on business are to retain records for at least six years. Where a Notice of Objection or appeal to the Tax Court has been filed, all records should be retained pending final resolution.

Some corporate work may overlap with property law. In this context, when documents are on file at the Registry of Deeds, file copies may be destroyed if the release acknowledging this is kept in the file. Trust ledgers and banking information should be kept for the duration of the

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[149] *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 96 provides that evidence from proceedings pursuant to the *Act* or similar legislation respecting a child who is the subject of the hearing, or respecting another child that was in the care or custody of a parent or guardian of the child who is subject of the hearing may be admitted as evidence.

lawyer's practice. Once the certificate conditions are voided through repayment of the debt, the lawyer should consider destroying the documentation. Incorporation documents and other corporate records should be maintained until a company goes through a legal dissolution, when documents may be destroyed. The dissolution order should be maintained indefinitely.

Where there is a property transaction, if the lawyer certifies title, with or without qualification, the lawyer shall keep available either an abstract of title or such title information or certificate of title on which the lawyer relied.[150] "Marketable" title exists if there is a clear chain of title for forty years plus one day[151] and title certification notes should be retained to allow for proof of marketable title.

Any unrecorded documents which relate to title, statements of adjustments, mortgage instructions, statements of disclosure, zoning letters and survey documents should be provided to the client with advice that these must be secured in a safe location indefinitely.

Closed files must be stored in a location that ensures the confidentiality of client materials and must be destroyed in a manner which also ensures confidentiality. Special concern exists for adoption files. Some information in these files may not be returned to clients when the file is closed nor disclosed at any other point. The file should be carefully labelled.[152]

When the time comes to destroy a file, the lawyer should review the file again to ensure its destruction is appropriate. The file may be sent to the client (if this is possible) or destroyed.

At minimum, a permanent record should be kept of all files destroyed or returned to clients. The information which is retained should include:

1. the client's name and address, file number and a brief description of the nature of the work;

2. notices to the client regarding the file's closure and destruction;

3. the date the file was closed and the lawyer who authorized its closure;

4. the date the file was destroyed and the lawyer who authorized its destruction; and

5. if applicable, authorization by client to destroy the file.

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[150] *Land Registration Act,* S.N.S. 2001, c. 6, s. 37(12)

[151] *Marketable Titles Act,* S.N.S. 1995-96, c. 9, s. 4(1)

[152] For example, an adopted child may not be entitled to have access to materials relating to the adoption. Parents who have adopted a child who was apprehended into care are not to have the identity of the child's natural parents revealed to them. This will mean ensuring the long form birth certificate and apprehension order that were provided to the Court are not made available to the parents.

Transfer or withdrawal

In addition to the practices outlined above, there are additional steps which should be taken where a lawyer withdraws or where the file is transferred.

Where carriage of a matter is being transferred to someone else, the lawyer should confirm why the retainer is being terminated.

When withdrawing from a retainer, the lawyer should do so in the manner agreed in the retainer contract or outlined in the fee letter. The lawyer should provide written notice to the client specifically identifying when and why[153] representation will cease. In an application to be removed from the record, care should be taken not to disclose privileged information.[154]

The lawyer should address any outstanding or final account and how the client is to pay it. The lawyer should provide a trust reconciliation. The lawyer should explain the circumstances in which the lawyer will consult with successor counsel and whether payment will be required for this. In writing, the lawyer must note any important deadlines and outstanding undertakings so the client can take steps to avoid any prejudice. It is prudent for the lawyer to confirm the client's receipt of this letter.

The successor lawyer, respecting the client's confidentiality, must be satisfied that initial lawyer approves of the transfer, has withdrawn or has been discharged. Seek the client's consent before making inquiries of the initial lawyer. The successor lawyer must also adhere to the *Legal Ethics and Professional Conduct Handbook* provisions regarding fees.

The confidentiality of the lawyer's past relationship with the client must be maintained. If the lawyer is to act as a witness on behalf of or against the client, the appropriate waiver of privilege must be obtained from the client or the testimony must be compelled.

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[153] Chapter 11, *Legal Ethics and Professional Conduct Handbook*, outlines the circumstances where the lawyer's withdrawal is optional and those circumstances where it is mandatory.

[154] *Leask* v. *Cronin* (1985), 18 C.C.C. (3d) 315 (B.C.S.C.) Civil Procedure Rule 44.06, the lawyer must apply to be removed from the record. The lawyer may not file a Notice of Intention to Act in Person on behalf of the client. Lawyers are able only to file Notices of Change of Solicitor.