

# When Lawyers Leave

## Procedures for firms and departing lawyers

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When a lawyer leaves a firm, it can be a time of stress and tension. It often raises many ethical issues and leads to the Law Society receiving questions about the proper procedure to follow. Can the departing lawyer solicit their former clients? Who should contact clients to advise of the departure? Who owns the documents in the file? This article will attempt to provide guidance to lawyers and law firms in these circumstances. However, lawyers, as always, are encouraged and advised to do their own research to ensure they meet their professional responsibilities.

### Remain Professional

Despite tense emotions and stress, it is of the utmost importance that the lawyers involved remain professional at all times. Both parties must seek to *minimize the expense* and *avoid prejudice* to the client.<sup>1</sup> Lawyers should behave civilly towards each other and the client, and avoid “unseemly rivalry.”<sup>2</sup>

### Can the departing lawyer solicit their former clients?

It is clear that neither the lawyer nor the law firm has any proprietary rights to clients.<sup>3</sup> The Saskatchewan *Code of Professional Conduct* (the “Code”) indicates that when a lawyer departs a firm, the client has three options: (1) to have the departing lawyer continue to act; (2) to have the law firm continue to act; or (3) to retain a new lawyer. The Code is clear that the final decision remains solely with the client. This decision should be made without any undue influence or harassment by either lawyer or law firm. A lawyer or law firm who is no longer retained should withdraw from representation in accordance with the Code.<sup>4</sup>

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### Who should contact clients to advise of the departure?

In most situations, there is a duty on the lawyers involved to inform each client of his/her right to choose their lawyer. It is preferable that a letter to the clients be sent jointly by the departing lawyer and the law firm; however, in the absence of a joint announcement, the announcement or notification should be provided by both, independently of each other, in a purely “informational” format.<sup>5</sup>

In some situations, the duty may not apply. For example, an associate leaving a firm may not have a duty to inform all clients for which the associate has worked. Some clients are more likely “firm clients” than that specific associate’s clients. In other cases, the firm may be agreeable to the departing lawyer taking certain client files. Ultimately, the threshold is whether the client would consider him/herself to be a client of the departing lawyer. If agreement between the departing lawyer and the law firm cannot be reached, then the departing lawyer may choose to inform the client on his/her own.<sup>6</sup>

1 The Law Society of Saskatchewan, Code of Professional Conduct, adopted by the Benchers of the Law Society on February 10, 2012, to be effective on July 1, 2012, at 70–71.

2 *Supra*, note 1 at 74 (commentary to section 2.07(9)).

3 See *Loreto v Little*, 2010 ONSC 755 (CanLII); and *A Law Firm v A Solicitor*, [1992] AJ No. 1242.

4 See section 2.07 of the Code.

5 Law Society of Saskatchewan Ethics Committee Professional Conduct Ruling, 2008 SKLSPC 2.

6 *Ibid.*

## To whom can the law firm release the file?

The Code indicates that at any time, subject to a valid solicitor's lien, a client can request his/her file and the lawyer is required to account for and deliver it to the client or to whomever the client directs.<sup>7</sup> Some lawyers prefer to release directly to the successor lawyer. This is acceptable as long as the client consents. However, if the client arrives at the office to retrieve the file, a lawyer cannot withhold the file from the client due to his/her preference.<sup>8</sup>

## How does the withdrawing law firm ensure payment?

A lawyer has the right to hold a client's property, including the client file, until the client has no account outstanding. This is referred to as a solicitor's lien. However, the lawyer should make every effort to settle the dispute and should not enforce a lien, if doing so would materially prejudice the client's position in a pending matter.<sup>9</sup> There may be other options available, such as making arrangements with the successor lawyer to give the outstanding invoice preference over his/her own.

## What is the procedure to transfer the file?

Once the client has chosen who will continue to represent them, the departing lawyer, the law firm, or both are discharged, depending on the client's choice. The withdrawing lawyer or law firm must do all that he/she/it can reasonably do to facilitate the orderly transfer of the file.<sup>10</sup>

Section 2.07(9) deals with the procedure to follow upon discharge.<sup>11</sup> The withdrawing party should as reasonably as practicable render an account, provide an accounting of any funds held in trust, and advise the client that he/she no longer represents the client and he/she will forward the file, once the payment arrangements are made (if applicable).

The withdrawing party should then review the file to prepare for transfer. He/she should determine whether there are any outstanding undertakings or trust conditions. The Code requires lawyers to fulfill every undertaking given and honour every trust condition, once accepted. Therefore, both the law firm and the departing lawyer should ensure either that all undertakings and trust conditions are satisfied or that the

successor lawyer will honour the given undertakings or trust conditions.<sup>12</sup> If neither is possible, and the terms cannot be amended in writing, the subject of the trust condition should be immediately returned to the person who imposed the trust condition. The client should then be informed of any such returned documents/funds.<sup>13</sup>

The withdrawing lawyer should review the remaining documents to assemble "all papers and property to which the client is entitled."<sup>14</sup> We are often asked what this phrase encompasses. While the Code outlines some ethical considerations, as listed above, the ownership of a client's file documents is determined by the common law.<sup>15</sup> The following section will outline general guidelines in this regard.

**Ensuring that the client is not prejudiced remains the primary focus.**

## Who owns the documents in the file?

When a lawyer departs a firm, there are broadly three types of documents: those that belong to the client, those that belong to the departing lawyer, and those that belong to the law firm. If a file is being transferred along with the departing lawyer, the law firm is likely only entitled to withhold its internal, administrative documents (applicable documents detailed below). If the file is remaining with the law firm, the departing lawyer will need to determine whether any of his/her documents (applicable documents detailed below) should be removed from the file. Ensuring that the client is not prejudiced remains the primary focus.

All documents created before the retainer are generally the property of the client or a third party. Neither the lawyer nor the law firm owns these documents, but rather holds these documents as agent. These documents are the client's property and should be transferred.<sup>16</sup>

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<sup>7</sup> *Supra*, note 1 at 64 (section 2.07(5)).

<sup>8</sup> If the client has an unpaid bill, refer to the "How does the withdrawing law firm ensure payment?"

<sup>9</sup> *Supra*, note 1 at 74 (commentary to section 2.07(9)).

<sup>10</sup> *Supra*, note 1 at 73 (commentary to section 2.07(8)).

<sup>11</sup> *Ibid.*

<sup>12</sup> We also advise that one contact the lawyer who imposed the trust condition to obtain consent from, or at least to notify that lawyer that the successor lawyer is assuming responsibility for undertakings/trust conditions.

<sup>13</sup> The Law Society of Upper Canada, *Guide to Closing your Practice for Lawyers*, <http://www.lsuc.on.ca/with.aspx?id=2147499389&langtype=1033#Toc391043512>, as of January 6, 2016.

<sup>14</sup> *Supra*, note 1 at 73 (section 2.07(9)(b)).

<sup>15</sup> See FT Horne, *Cordery's Law Relating to Solicitors*, 8th ed. (London: Butterworths, 1988); *Price v Lambrinos*, 2012 ONSC 4856; *Aggio v Rosenberg* (1981), 24 CPC 7 (ONSCM); *Chantrey Martin & Co v Martin*, [1953] 2 QB 286 (Eng CA); *Spencer v Crowe*, 1986 CanLII 2002 (NS SC); *Bowman v Rainy River (Town)*, 2007 CanLII 4861 (ONSC).

<sup>16</sup> The Law Society of British Columbia, *Ownership of Documents in a Client's File: Practice Resource*, July 2015 [BC], at 2.

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Documents created during the retainer will require a more thorough review. Generally, a client owns any documents created for the client's benefit and for which the client paid. Examples include memoranda of law, court documents, witness statements, and notes from meetings/telephone attendances with the client or third parties. Such documents should be transferred to the client or successor lawyer.<sup>17</sup>

The lawyer generally owns any documents that the lawyer created for the lawyer's benefit and for which the client was not charged. Even though these documents were created in relation to work done for the client, they remain the lawyer's property. Examples of these documents include: working notes to aid the lawyer's memory, and ethical consultations. These documents are not the property of the client and are at the lawyer's discretion to transfer.<sup>18</sup>

**Ownership over correspondence sent to the lawyer depends on the sender.**

The law firm generally owns any documents that the lawyer created for the benefit of the law firm. Examples of these documents include: time entry records,<sup>19</sup> calendar entries, accounting records, conflict searches, office administration forms (pre-bills, cheque requisitions, etc.), inter-office memos, and communications between lawyers in the firm. These documents are not the property of the client and are typically not at issue.<sup>20</sup>

Ownership over correspondence sent to the lawyer depends on the sender. Any correspondence the client sent to the lawyer is the property of the lawyer. This includes client instructions. Similarly, any correspondence the lawyer sent to the client is the property of the client. This includes advice, opinions and other correspondence. However, any documents that a third party sent to the lawyer belong to the client. These would include letters, emails, disbursement receipts, expert witness statements, reports, etc. Where the file is transferred along with the departing lawyer, nearly all correspondence should likely be transferred.

<sup>17</sup> *Supra*, note 1, at 3.

<sup>18</sup> *Supra*, note 16, at 3–4.

<sup>19</sup> Please note that this is only applies in the context of transferring the file. There is nothing that prevents a client from requesting a detailed bill in a fee dispute.

<sup>20</sup> This article does not cover the issue of copyrighted documents, which may be the property of the law firm.

If a lawyer or law firm representative is uncertain whether a document belongs to a certain party or not, he/she should consider the following principles to make a determination:

- (1) The client owns any documents that the lawyer received on the client's behalf;
- (2) The client likely owns any documents that the lawyer created to benefit the client;
- (3) The client likely owns any documents that he/she paid for;
- (4) If the non-disclosure of the document would prejudice the client, the client likely owns the document;
- (5) If still in doubt, the lawyer can contact the Law Society for an informal ethics opinion.

### How can I protect myself against a negligence claim or complaint?

The withdrawing lawyer may wish to retain copies of documents in case they are required to defend against a negligence claim or a complaint. However, this is done at the *withdrawing party's* expense.<sup>21</sup>

#### In Summary:

1. Lawyers must remain professional at all times during this transition period and above all should minimize the expense and avoid the prejudice to the client.
2. The client has the right to be informed that their lawyer is leaving a firm and to decide who will represent them.
3. The Law Society recommends a joint letter to advise the client of the departure, and of their option to stay with the firm, follow the departing lawyer, or seek new counsel.
4. In the absence of a joint letter, a departing lawyer may contact his/her clients to advise of his/her departure and provide new contact information.
5. The withdrawing party should transfer the file at the direction of the client. This includes the client him/herself retrieving the file.
6. As soon as practicable, the withdrawing party should render an account, provide an accounting of trust funds, notify the client of the withdrawal, and advise of a solicitor's lien (if applicable).

<sup>21</sup> Law Society of Saskatchewan Ethics Committee Professional Conduct Ruling, 2007 SKLSPC 13, *Benchers' Digest*, vol. 20, no. 5, November 2007 at 7.

7. Lawyers should not maintain solicitor's liens, where doing so would materially prejudice the client.
8. The withdrawing party should prepare the file to transfer:
  - a. Identify any outstanding undertakings or trust conditions. If possible, satisfy these obligations prior to transfer or confirm that the successor lawyer will honour these obligations. If this cannot be arranged, return the documents subject to trust conditions to the lawyer who imposed them and advise the client of same.
  - b. The client is entitled to all documents on the file, except for those documents created only for the benefit of either the lawyer or the law firm, and for which the client did not pay. These are typically inter-office memos or communications, and accounting and office administration documents.
  - c. If the withdrawing party is uncertain of whether they must provide a document, they should contact the Law Society for an informal opinion.
9. If the withdrawing party wishes to keep copies of documents to defend against a negligence claim or complaint, they may at the withdrawing party's cost. ➔