Guidance Statement No. 8 – Termination of a retainer (Published 31 August 2017)

1. Introduction

1.1. Who should read this Guidance Statement?
This Guidance Statement is for solicitors and law practices.

1.2. What are the issues?
- When is a client or solicitor entitled to terminate a retainer?
- How should a retainer be terminated?
- What are the duties of the solicitor on termination of a retainer?

1.3. Status of this Guidance Statement
This Guidance Statement is issued by the Queensland Law Society (QLS) Ethics Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the guidance statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct. This Guidance Statement represents a standard of good practice and is endorsed by the QLS Ethics Committee.

2. Ethical principles

ASCR

Rule 13 provides:

13. Completion or termination of engagement

13.1. A solicitor with designated responsibility for a client’s matter must ensure completion of the legal services for that matter UNLESS:

13.1.1. the client has otherwise agreed;
13.1.2. the law practice is discharged from the engagement by the client;
13.1.3. the law practice terminates the engagement for just cause and on reasonable notice; or
13.1.4. the engagement comes to an end by operation of law.
13.2. Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement UNLESS the solicitor or law practice has:

13.2.1. served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least seven (7) days to make satisfactory arrangements for payment of the solicitor's costs; and

13.2.2. given appropriate notice to the registrar of the court in which the trial listed to commence.

13.3. Where a client is legally assisted and the grant of aid is withdrawn or otherwise terminated, a solicitor or law practice may terminate the engagement by giving reasonable notice in writing to the client, such that the client has a reasonable opportunity to make other satisfactory arrangements for payment of costs which would be incurred if the engagement continued.

3. Issues

3.1. When is a client or solicitor entitled to terminate a retainer?

3.1.1. Termination by agreement

A retainer is a contract, even where there is nothing in writing, and so is subject to the principles of contract law as to its termination. Therefore, a retainer may be terminated by agreement between the solicitor and the client, including as provided in a written costs agreement.

3.1.2. Termination by the client

The client may terminate a retainer at any time. Even if the client has agreed to provide a period of notice, it should be noted that it is unlikely that the solicitor's remedy for the client's failure to do so would be anything other than damages. Whether a client has terminated a retainer for ‘good reason’ may, however, be relevant as to whether the solicitor can maintain a lien over the client's documents for any unpaid legal costs.\(^2\)

A solicitor should only consider a retainer to have been terminated by a client when the client gives a clear indication of their intention to do so.\(^3\) An expression of dissatisfaction with the solicitor on the part of the client will not generally be sufficient to constitute such an indication. If there are any doubts as to whether the client has terminated the retainer, the solicitor should take steps to confirm the position in a way which is clear and unequivocal.\(^4\) It is recommended that the

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2 Stark v Dennett [2008] QCA 50, [18]-[19]; see also Australian Solicitors Conduct Rules 2012, rule 15 and ‘3.3 What are the duties of the solicitor on termination of a retainer’, below.
3 Re Wingfield & Blew (Solicitors) [1904] 2 Ch 665, 684.
4 Stark v Dennett [2008] QCA 50, [46].
solicitor request that the client put their intention to terminate the retainer in writing.

It should be noted that termination by a client does not necessarily release a solicitor from an undertaking that was given in the course of legal practice.5

In addition, while this Guidance Statement is primarily concerned with the conduct of law firms and solicitors in private practice, it is observed that the client's absolute right to change lawyers at any time is potentially limited where the solicitor is employed as in-house counsel, as their terms of employment and the applicable unfair dismissal legislation may restrict the ability of the employer to terminate an in-house solicitor's employment.6

3.1.3. Termination by the solicitor

In circumstances where the client does not consent to the termination of the retainer, and in the absence of an express right to do so (such as in accordance with a written costs agreement), a solicitor can only withdraw for 'just cause and on reasonable notice'.7 This reflects the position at common law.8 If the solicitor purports to terminate for another basis which has not been agreed, it should be noted that the courts have treated the retainer as an 'entire contract', with the effect that the solicitor may be unable to recover their fees for work performed prior to termination.9 The solicitor's remuneration in such a case may be addressed in, for example, a written costs agreement. Speculative 'no win, no fee' retainers also present particular challenges.10

'Just cause'

Situations which may constitute 'just cause'11 include the following:

a) The client's actions or behaviour are fundamentally inconsistent with the retainer, so as to prevent the solicitor from properly performing their duties. This may occur if the client:

(i) delays or refuses to pay the solicitor's costs in breach of the retainer;12

(ii) makes insulting (and unjustified) statements about the solicitor's conduct or character13 or is otherwise abusive, offensive, obstructionist or engages in threatening, harassing or bullying behaviour towards the solicitor or their staff;

(iii) has knowingly provided false information to the solicitor, for example with a view to using the solicitor to defraud another person or to mislead a court;

(iv) insists the solicitor commit a breach of the law or professional rules or engage in conduct where such a breach will necessarily be the result;

8 Richard Buxton (a firm) v Mills-Owen [2012] 4 All ER 405, 421.
9 Ibid.
11 See generally, G E Dal Pont, ‘Riley Solicitors Manual’ (LexisNexis Butterworths, Rev. ed, 2017) at [3165.5] and [3165.10].
12 Super 1000 Pty Ltd v Pacific General Securities Ltd [2007] NSWSC 171.
(v) insists the solicitor advance arguments which are ‘hopeless’, ‘doomed to disaster’, ‘bound to fail’ or which are ‘not properly arguable’;\(^{14}\)

(vi) has indicated that the necessary relationship of trust between the parties has broken down, to the extent that the basis for the retainer has been compromised;\(^{15}\)

(vii) fails to provide proper instructions;\(^{16}\)

(viii) in giving instructions to the solicitor, the solicitor reasonably believes that the client’s instructions are not free, voluntary or are the subject of a third party overbearing the client;\(^{17}\) or

(ix) makes it clear that they have retained, or intend to retain, another solicitor to carry out the legal services under the retainer.\(^{18}\)

b) Continuing the retainer would create a conflict, such as placing the solicitor in:

(i) breach of their duty of confidentiality owed to someone else, such as another client;\(^{19}\)

(ii) a conflict between duties owed to the current and former client;\(^{20}\)

(iii) a conflict between duties owed to two or more current clients;\(^{21}\) or

(iv) a conflict between the solicitor’s own interests and the duty to serve the best interests of the client.\(^{22}\)

c) In a case in which it is known or becomes apparent that a solicitor will be required to give evidence material to the determination of contested issues and it would be prejudicial to the administration of justice for the solicitor to continue to act for the client (see Rule 27 of the ASCR).

d) If the client is legally aided and the grant of legal aid has been withdrawn or terminated and the client is unable to make any other satisfactory arrangements for payment of the lawyer’s costs that would be incurred if the retainer continued (in accordance with Rule 13.3).

e) If continuing the retainer is likely to have a seriously adverse effect upon the solicitor’s health\(^{23}\) (in the case of a sole practitioner or, in case of a firm, where it is also unable to provide another solicitor in that area of practice).

The requirement of ‘just cause’ will not be established in circumstances where the solicitor merely has the opportunity to do more remunerative work, has lost interest in the client’s matter or that the client is merely difficult to deal with.\(^{24}\)

\(^{14}\) Richard Buxton (a firm) v Mills-Owen [2012] 4 All ER 405, 418-420.

\(^{15}\) G E Dal Pont, ‘Riley Solicitors Manual’ (LexisNexis Butterworths, Rev. ed, 2017) at [3165.5]; Lakic v Prior [2016] VASC 293, [106] is an example of this breakdown where the client consistently failed to follow the advice of the solicitor.


\(^{18}\) Rigoli Lawyers v Arman [2009] FamCA 42.

\(^{19}\) Australian Solicitors Conduct Rules 2012, rule 9.

\(^{20}\) Ibid, rule 10.

\(^{21}\) Ibid, rule 11.

\(^{22}\) Ibid, rule 12.

\(^{23}\) Forney v Bushe (1954) 104 LJ 604; GE Dal Pont, Lawyers’ Professional Responsibility, 6th ed. 2017 at [3.205] refers to the death of a solicitor or client as a ground for “just cause”.

\(^{24}\) G E Dal Pont, ‘Riley Solicitors Manual’ (LexisNexis Butterworths, Rev. ed, 2017) at [3165.10].
Client incapacity

A client’s incapacity will not by itself terminate the solicitor’s retainer.\(^{25}\) Incapacity will, however, suspend the solicitor’s authority to act on instructions from the client until such time as an appropriate representative or guardian has been appointed who is able to instruct the solicitor\(^{26}\) or the client regains his or her capacity.

However, if that appointment is not made within a reasonable time, and especially where the solicitor is incurring costs in the interim, it is possible that there may still be a basis for the solicitor to terminate. This would likely require notice to the relevant authorities or, in the case of litigation, the leave of the court in accordance with the relevant rules.

Whether a retainer terminates automatically in the event of incapacity (or death) may also be dealt with expressly in the written terms of the retainer\(^{27}\) (such as in a written costs agreement).

Is there still a retainer?

Rule 13 will not be relevant where there is no longer a retainer. It is therefore important that the solicitor properly consider the scope of the retainer and whether it has been completed or is still on foot. The existence of a set of rates or terms for potential work in the future may not constitute a retainer, as the subject matter and scope of the work would not yet be known (although this will be a matter of construction in each case).

Agreed bases for termination

The solicitor and client may agree other bases for termination of the retainer (such as in a written cost agreement), or it may be terminated for other reasons permitted by law (such as breach of a fundamental term), but it is likely that most of the above ‘just cause’ circumstances would still entitle the solicitor to terminate, even if not expressly agreed. Equally, the bases of termination that may be expressly agreed will still have some limitations (for example, if Rule 13.2 applies).

‘Reasonable notice’

What constitutes ‘reasonable notice’ for this purpose, will depend on the facts of each case.\(^{28}\) The solicitor should give consideration to factors such as the status of the matter, whether there are any forthcoming court or other dates (such as the expiry of a limitation period) and whether the client will be prejudiced by the termination of the retainer. The notice period should allow reasonable time for the engagement of a new law firm, having regard to the circumstances.

If the solicitor is seeking to terminate a retainer because a conflict has become apparent, or because proceedings will cause the solicitor to act in breach of their professional duties, then this may necessitate a much shorter period of notice, or even an immediate withdrawal, depending on the circumstances. For example, to avoid breaching their duty of confidentiality to a former client, where this has only

\(^{25}\) Blankley v Central Manchester and Manchester Children’s University Hospital NHS Trust [2014] EWHC 168 (QB).
\(^{26}\) Ibid [38].
\(^{27}\) Ibid [41].
\(^{28}\) For example, in the case of Heslop v Cousins [2007] NZLR 679 it was held that requiring a client to settle outstanding fees within four business days before the termination of legal services did not constitute reasonable notice, in circumstances where the solicitor had agreed to represent the clients knowing they were in serious financial difficulty.
been discovered after work has commenced, a solicitor may have no option but to limit or even stop work on the matter at once.

Clients facing trial for a serious criminal offence

Rule 13.2 specifically provides that where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement, unless the solicitor or practice has:

a) served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least seven days to make satisfactory arrangements for payment of the solicitor's costs; and

b) given appropriate notice to the registrar of the court in which the trial is listed to commence.

Criminal law is an example of an area of practice where, aside from the Rules, specific rules of court apply to the termination of a retainer and the consequential withdrawal from the record.\textsuperscript{29} The ASCR Commentary notes that considering rules 18 and 19 of the Criminal Practice Rules 1999 (Qld) and Rule 13.2 of the ASCR together requires that at least 28 days’ notice must be given before the accused’s next appearance in court.

This rule applies despite what may be agreed between the solicitor and client.

3.2. How should a retainer be terminated?

3.2.1. Written notice

It is recommended that the solicitor provide written notice in advance of their intention to terminate a retainer and specify the date upon which legal services will cease. Provided that the grounds for termination do not involve the disclosure of confidential information of another client (i.e. a conflict), the reasons for termination should be disclosed in that written notice whether it be by reference to the agreed retainer or a ‘just cause’ ground.

Litigation

If litigation is on foot, the court has a discretion whether or not to grant leave to a solicitor to file a notice of ceasing to act for a particular party, however:

“[U]nless there are special circumstances which render it expedient to retain the solicitor on the record the order will generally be made as a matter of course upon proof that the solicitor has in fact ceased to act for the party and that no steps have been taken to take the solicitor’s name off the records”.\textsuperscript{30}

Where the solicitor is acting in proceedings in court, it is also necessary to comply with the applicable rules of the court in relation to withdrawal, for example, Uniform Civil Procedure Rules 1999 (Qld), rules 990 and 991. (These court rules will still apply, and leave will still need to be sought, regardless of

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\textsuperscript{29} See Criminal Practice Rules 1999 (Qld), r 19. Note that this rule does not apply to proceedings in the Magistrates Court (see r 5). However, a practice has emerged where Magistrates expect similar notice for withdrawing from a Court record.

whether the solicitor purports to terminate the retainer under the express terms of, for example, a written costs agreement).

The applicable period of notice may be agreed. Where no such notice period is agreed, it is likely that such notice would also need to be that which is reasonable in the circumstances. It is also the case that any right that the solicitor is entitled to exercise under an agreement with the client, must be exercised in accordance with the solicitor’s professional obligations generally.

3.3. **What are the duties of the solicitor on termination of a retainer?**

A solicitor has duties to the client which continue beyond the termination of a retainer. These include:

a) ensuring that, as far as is reasonably possible, the client is not unduly disadvantaged by reason of the termination of the retainer. It is recommended that in circumstances where a file is being delivered to a former client in the absence of new legal representation, the solicitor should inform the client, in writing, of the likely consequences of failing to properly attend to work remaining to be done on a matter and, if applicable, advise the client to seek alternative legal representation as soon as possible;\(^{31}\)

b) ensuring that all client files and documents to be retained by the solicitor are placed securely in storage and held for a minimum of seven years (or longer if appropriate);\(^ {32}\) and

c) if requested to do so, arranging for the delivery of all client documents to the client or the client’s new solicitor,\(^ {33}\) unless, where there is an effective lien over the documents, the new solicitor makes arrangements for reasonable security for the first solicitor’s unpaid costs.\(^ {34}\)

Further, a solicitor’s duty of confidentiality to the client continues after the termination of the client retainer\(^ {35}\) and a solicitor must continue to avoid conflicts between duties owed to current and former clients in accordance with the ASCR and applicable law.\(^ {36}\)

4. **More Information**

Solicitors are also referred to:

- *Guidance Statement No. 6 - Form of Delivery for Client Documents*

For further assistance please contact an Ethics Solicitor in the QLS Ethics Centre on **07 3842 5843** or ethics@qls.com.au.

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\(^{31}\) As suggested in the former *Legal Profession Conduct Rules 2010 (WA)*, Sch 6.

\(^{32}\) *Australian Solicitors Conduct Rules 2012*, rule 14.

\(^{33}\) See also *Guidance Statement No. 6 - Form of Delivery for Client Documents*.

\(^{34}\) *Australian Solicitors Conduct Rules 2012*, rule 15.

\(^{35}\) Ibid, rule 9.

\(^{36}\) Ibid, rule 10.