

Draft discussion paper on technology-related terms in retainer agreements

Prepared by the CCLA Technology Committee working group on retainer agreements
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The Law Society of Ontario recommends all lawyers conclude written retainer agreements with their clients.¹ By putting essential terms of the lawyer-client relationship in writing at the start of the mandate, lawyers and clients alike can avoid surprises or disagreements as the relationship develops. Written retainer agreements can also teach clients—especially those who don't regularly use legal services—about fundamental features of the lawyer-client relationship.

The Law Society also recommends steps lawyers should take when using electronic means to communicate in confidence with clients.² These recommendations include informing clients of technology-related security risks and confirming in writing that clients wish to communicate electronically.

This discussion paper tries to put these ideas into practice by proposing some technology-related terms lawyers can include in their retainer agreements. We have tried to draft terms that will help both lawyers and clients adopt good technology practices. We have also tried to use plain language.

Lawyers' practices and needs vary widely. A retainer term that makes sense for one lawyer might be irrelevant, or even counterproductive, for another. With this in mind, we offer some variations on the model terms for lawyers to choose from. You can always modify them further to suit your needs.

This discussion paper was prepared by the County of Carleton Law Association Technology Committee's working group on retainer agreements. The project is a work in progress. We welcome lawyers' feedback. Please send your comments to info@ccla-abcc.ca.

1 Email communications

For most lawyers, email is now the most common means of communicating with clients. Its advantages are well-known, but it comes with a real risk of accidental waiver of privilege. The following proposed terms attempt to meet this risk.

¹ See <https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/retainer-or-non-engagement/retainer-agreement-or-engagement-letter>.

² See <https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/technology>.

We will frequently communicate with you by email. It is up to you to provide us with an email address you consider sufficiently secure to receive confidential and/or privileged communications from us.

If this is a personal matter, we recommend that you avoid using your work email address, which is likely the property of your employer and may be accessible by other people.

Lawyers can't control who has access to a client's email account. Some clients may share their account with non-clients such as spouses. Employees' work email accounts may be accessible or controlled by their employers. To avoid these risks, these proposed terms ask clients to provide their lawyers with a secure and confidential email address over which they have control.

Our emails to you will include confidential and/or privileged information. By forwarding our emails to other people, you may be at risk of waiving privilege or disclosing confidential information. Copying other people on emails you send us may also waive privilege or disclose confidential information. Waivers of privilege and disclosure of confidential information to others could hurt your case or harm your interests. Please take care in how you use the information you send us and receive from us by email.

This provision alerts the client to the risks of misusing email communications from or to lawyers.

2 Text/message-based communications

Electronic communications between lawyers and clients are not limited to email any more. Texting or messaging through platforms such as iMessage, Messenger and WhatsApp are increasingly common. These technologies can be very convenient. But keeping track of the communications that occur on them, and assimilating them into the lawyer's file, can be difficult.

With that in mind, we have drafted two model retainer agreement terms: one for lawyers who prefer not to communicate by text message or messaging apps at all, and one for lawyers willing to use messaging but want to warn clients of risks associated with them.

We do not communicate with clients by text message or messaging apps. You may call or email us.

Some lawyers will prefer not to use messaging apps at all. Some lawyers don't share their cell phone number with clients. Others may be concerned about keeping a complete record of lawyer-client communications over several platforms. If you don't want your client to communicate with you by messaging, consider saying so in your retainer agreement.

If you choose to communicate with us by text messages or messaging apps, it may be hard to keep your information private and secure. You should take care to ensure that your messages to us, and any replies from us, are accessible only by you. You acknowledge that there are risks associated with these forms of communication.

Some lawyers may not want to prohibit texting and messaging with clients. We nevertheless suggest that lawyers consider including some warning in their retainer agreements about the risks associated with these technologies.

3 Cloud-based information storage

Cloud-based technologies are quickly becoming ubiquitous. The advantages to storing client information in the cloud include redundancy and automated back-ups (to protect against data loss) and continual access across locations (at work, at home, and on the road) and devices (computers, phones, tablets).

It is good practice to notify clients of how you store information about them, particularly whether you are using cloud-based services. It may also be wise to notify clients of the risk, however small, that cloud-stored information may be subject to compelled disclosure in other jurisdictions.

We may store information about you, such as your documents or our own documents about you, on network-based computer services ("in the cloud"). Information stored in the cloud may be located in servers outside Canada and, if so, may be subject to disclosure under foreign law.

The CCLA Technology Committee has a working group on cloud computing and is continuing to explore issues arising from this technology for legal practice.

What did we miss?

We want your feedback. Do you have ideas to improve what we have done? Maybe you have tech-related retainer terms of your own that have proven useful and that you're willing to share. Is there a technology or an issue we've overlooked?

Please let us know. Send your comments to info@ccla-abcc.ca.