

MLL335 – Legal Practice & Ethics exam & study notes

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Topic 3: Money Matters

Introduction

- Of the many duties owed by a lawyer to a client none are more important than the safekeeping and proper dealing with the money of that client.
 - To fail in this duty risks more than disbarment, it may also lead to imprisonment.
- There are safeguards imposed by law to protect clients from over-charging and related money issues.
- Once instructions are received and a lawyer provides advice and/or legal work, a retainer is created.
- Unless a lawyer is offering their services on a pro bono basis, they will charge for their time.
- Legislation places an obligation on lawyers to provide clients with costs agreements and disclosure statements.
- Clients sometimes make the decision, prior to their matter coming to an end, to change lawyers.
- When this occurs and the client refuses to pay the original lawyer's account, the lawyer can claim a lien over the file.
 - This is a common law concept.
- Lawyers who are authorised to operate a trust account have added obligations.

Retainer

- A retainer is essentially a contract between a lawyer and client for the provision of legal services.
- The retainer must include all elements of a contract, namely:
 - A mutual agreement;
 - Evidenced in writing or orally or inferred; and
 - Must have terms that express the contractual rights and obligations of both parties.
- A retainer includes the various components of the lawyer-client relationship. It:
 - Identifies the client;
 - Describes the services to be delivered by the lawyer;
 - Identifies who is instructing the lawyer; and
 - Outlines the scope of the lawyer's authority and duties.
- It is imperative that lawyers clearly outline what the scope of the retainer is and they may even go so far as stating what it does not include.
- The law of tort and the law of contract may impose on a lawyer an obligation to exercise reasonable care.
 - Where a lawyer is negligent, they may be concurrently liable in tort and contract.
 - **Astley v Austrust Ltd (1999) 197 CLR 1 The law of equity imposes fiduciary obligations.**
- Statutory law imposes an obligation not to engage in conduct that is misleading or likely to mislead.
- The retainer marks the parameters of the duties owed by the lawyer in tort.
 - A lawyer generally cannot be held responsible, in tort, for issues outside the scope of the retainer.

- Curnuck v Nitschke [2001] NSWCA 176
- The standard of care is that which is reasonably expected of practitioners.
 - Heydon v NRMA Ltd (2000) 51 NSWLR 1
- The professional conduct rules prohibit lawyers, or their associates, from borrowing money from:
 - a client of the solicitor or of the solicitor's law practice; or
 - a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the solicitor or of the solicitor's law practice's advice in relation to investment of money.
 - Rule 12.3 of the Conduct Rules
 - See, also, Legal Service Commissioner v Adami (Legal Practice) [2014] VCAT 1107
 - See, also, Legal Services Commissioner v. McKern [2008] NSWADT
 - Exceptions are available if the client is:
 - an Authorised Deposit-taking Institution;
 - a trustee company;
 - the responsible entity of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 or a custodian for such a scheme;
 - an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or the employer of the solicitor.
 - Legal Services Commissioner v McKern [2008] NSWADT
- Where there is no evidence of a retainer, there can be no claim by the lawyer to costs and disbursements.
- A retainer also determines the extent of claims against professional indemnity insurance.
- A retainer can have an earlier termination or a natural termination where the transaction comes to an end.
- Clients can terminate a retainer at any time.
 - Once legal fees are paid, the client is entitled to the file.
- Lawyers are not bound to represent or continue to act on behalf of a client, except where the lawyer is engaged in an advocacy role.
- Where a lawyer wishes to terminate the retainer early, they must act with just cause and provide the client with reasonable notice in order to avoid the client suffering loss as a result of the lawyer ceasing to act.
- A lien over the file may not be claimed by a lawyer who terminates early.
 - This may occur where the client's matter is currently in court and the file is required by either the client or their new lawyer.
- Legislation dictates that all lawyers holding a current practicing certificate must be insured.
 - Section 211 of the LPUL
- Each State and Territory has established a legal practitioner's fidelity or guarantee fund.
- The funds exist to compensate those who have suffered a pecuniary loss due to the dishonest acts or omissions of a lawyer and/or law firm which relate to trust money or property.
- The funds are made up of annual contributions from lawyers as part of their Practising Certificate requirements.