

Retainer/Duty of Representation

i) General retainer

- The retainer is a contract between a lawyer and a client for the provision of legal services by the lawyer. It sets the contractual parameters, rights and obligations- may be express or implied obligations and general rules of contract construction apply (e.g. construing meaning of the terms). Usually the retainer is entered with a solicitor, but under s 83(3) LPA “a barrister or solicitor may enter into a contract for the provision of services with a client” (therefore both can create client retainer). However, under the Barrister’s Rules 95-99 there are restrictions including that barristers cannot accept if already committed or reasonably likely to be required to appear (Rule 98).
- The retainer is created/comes into effect by the client if the client first instructs the law practice “if the law practice first receives instructions from or on behalf of the client...whether in person or by post, telephone, fax, e-mail, or other form of communication (s 306 LPA). Emphasis on receiving- puts onus on client to prove that the practice received the instructions to act.
- Preferred to be confirmed in writing about the status of the r’ship.

May be created:

i) Orally

ii) Written

iii) Inferred from conduct of the parties (e.g. payment for services shows retainer)

- An implied retainer is more likely to be proved if solicitor “accepts responsibility... [and there is] a reliance on him to apply his expert knowledge and skill in the performance of that work” (Pegrum). This is especially true if the work requires “special knowledge and skill” (Pegrum)- consider if lawyer claims it is their area of expertise.
- The person alleging the retainer bears the onus of proof in establishing it (Griffiths v Evans). The word of the client is preferred over the word of the solicitor (Griffiths). May be issues around elements of formation (e.g. intention to create legal relations- Ermogenous)- all the circumstances of the case must be considered.
- There will be an implied retainer if an individual comes to lawyer and you do not advise them to seek independent advice (McGeoch v Hendriks & Ors). This is because if the lawyer freely gives advice, they have assumed responsibility for that advice.
- The scope of the work to be completed should be specified.
- Responsibility to do a sufficient job regardless of a lawyer’s own feelings about the client; there is still a requirement to “act up to proper standards of conduct...sound advice to the best of his ability” (R v Tighe and Maher).

Solicitors can choose clients, issues in relation to Rule 4.1 relating fundamental ethical duties. However, solicitors must decline a brief if:

- i) Minimum standards of competence (Rule 4, can refer to another solicitor (Un v Schroter- If there is no level of “experience” should have made arrangements for the client to “be seen by another legal practitioner with the requisite skills”. Either more time needs to be given or someone “better skilled in that field of law” should be called upon). If the solicitor feels they are not competent in that area, they should decline. Unless you are prepared to become competent (i.e. obtain skill without delay or cost, warn the client-file notes).
- ii) Conflicting interests (E.g. Interests conflict- see Rules 10, 11, 12).

HOWEVER, Rule 21 Barristers Rules/Cab-rank principle provides that a barrister must accept a brief from a solicitor- you should take the next brief that comes along. Unless the brief is not w/in barristers “capacity, skill and experience” (s 21(a)), they are available to work at the time and barrister not already engaged professionally which may as a “real possibility” prevent barrister being able to advance client’s interests to barrister’s skill and diligence (s 21(b)), fee offered is acceptable etc (s 21(c)).

Retainer- Express Terms:

- Identify client and lawyer
- Scope of work to be performed by lawyer
- Method of costing work and client’s responsibility to pay for the work
- NOTE: If dispute, interpreted contra proferentum against the lawyer, lawyer-client is also a r’ship of influence (so potential for undue influence).

Retainer- Implied Terms:

- Lawyer will use their best endeavours to protect client’s interest and exercise reasonable care and skill in carrying out client’s interests (Groom v Crocker, Rule 4.1.1).
- “work will be performed efficiently” (Michaels v Daley).
- Authority to do things incidental to retainer
- Duty of confidentiality
- **Client free to withdraw at any time- the lawyer is permitted to withdraw subject to Rule 13 (consent or “just cause and reasonable notice etc).**

Termination of retainer/engagement

- Need for client’s permission (Rule 13.1.1), although this is not required if the practitioner terminates the retainer “for just cause and on reasonable notice” (Rule 13.1.3).

- On termination of retainer and satisfaction of any solicitor’s lien, the client’s documentation should be returned (Rule 14).

- Solicitors lien (Rule 15, 14)- This occurs when a retainer has been terminated and costs due to a practitioner pursuant to a costs agreement are outstanding, practitioner may be

entitled to refuse to hand over to client any documents/chattels of the client currently in the possession of the practitioner. However, under Rule 15.1, there are exceptions for “documents which are essential to the client’s defence of prosecution of current proceedings” - must have an undertaking from second solicitor etc. (Rule 15.1.1).

Problem Q’n example (E.g. Clients costs are said to not have been paid).

iii) Costs (Part 3.2 Division 3 LPA w/ costs disclosure)- ss 309-317

- Costs are the payment that the lawyer charges for the provision of their legal services. Disbursements are ‘outlays’ - the expenses paid by a law practice in the course of providing their services.
- Once the lawyer has determined they must disclose costs as soon as possible, including the basis on which the costs are calculated (s 309(1)(a)) as well as an estimate of total legal costs if reasonably practicable or if it’s not a range of estimates and explanation of major variables (s 309(1)(c)). Additionally, disclosure of client right to negotiate a costs agreement, if it’s a litigious matter notification of the range of costs that may be recovered from other party or those the client may have to pay if unsuccessful.
- This disclosure must be in writing before or asap after retained (s 311 LPA).
- Exceptions to disclosure (s 312 LPA)- including it total legal costs, excluding disbursements, are not likely to exceed \$750 (s 312(1)(a)), if client has received a disclosure from same law practice in last 12 mths (s 312 (b)(i)), client waives in writing (b)(ii) etc.
- Consequences (take to relevant Law Council): Cannot claim costs or take action to recover costs until cost assessor has assessed the costs (s 317(1)), costs can be reduced as ‘penalty’ (s 317(4)), capable of being unsatisfactory professional misconduct (s 496) or professional misconduct (s 497) (s 317(7)).

Costs Agreement (Part 3.2, Division 3 LPA)

- It is strongly advised for a lawyer to enter into a costs agreement in order to minimise difficulties associated with recovery of costs. They are a contract enforced like any other (s 326). They can be set aside if the costs assessor is satisfied the agreement “is not fair or reasonable” (s 328 (1)). Fairness=relating to circs at formation of agreement, reasonable= operation was reasonable in relation to the particular client. Consequences: Substantial reduction in costs payable by the client- PM is possibility.
- Can form part of the retainer or be separate.
- Costs agreements must be in writing or they are void (s 322(2)). Best practice to also get it signed by client. Alternatively they can be a written offer that is accepted in writing or by other conduct (s 322(3)).
- Conditional costs agreements (s 323)- Payment of all practitioner’s costs are contingent on the successful outcome of the matter (i.e. no win-no fee).

Duty to Advise

- The lawyer must tell the client the issues and the client's rights and obligations in the matter- includes making sure they understand the advice, keep client informed of all developments and advising them of available options to resolve it.
- Rule 7 (Communication of clear and timely advice, also advising about ADR methods in Rule 7.2) and 8 (solicitor must follow client's lawful, proper and competent instructions). There is always an implied term in retainer that solicitor will follow instructions (Rule 8), however if no express term to the contrary or in exceptional circumstances where "client's instruction contravenes a solicitor's supervening duty to the court or the solicitor's ethical responsibilities" (*Equuscorp v Wilmoth Field Warne*).
- Legal advice should be in "terms appropriate to the comprehension and experience of the particular recipient" (*County Personnel (Employment Agency) v Alan Pulver & Co*) (e.g. appropriate to age, disability, business experience of client).
- Also note Rule 17.1- solicitor must not act as 'mere mouthpiece' of client- must exercise independent forensic judgement.
- Duty to advise by communicating to a client on reasonable request a written report about the progress of the matter (s 318 (1)).
- The duty will always exist, except for an express exclusion or restriction in retainer, to give "any advice reasonable necessary to protect the client's interests whether or not expressly requested" (*Dalleagles v Australian Securities Commission- Anderson J*).
- If a client insist on a course of action that would bring the lawyer in conflict with their duty to the court and proper admin of justice, practitioner must terminate the retainer (*R v Tighe and Maher*).
- Primary obligation is to "give effect to the instructions" of client- no financial advice or psychological counselling is to be done unless specifically agreed in the retainer (*Cousins*).
- Consequences of breach: Not advising fully can amount to negligence (*Micos v Diamond- forget to advise client about conveyancing defect, don't advise=negligence*). Also since implied term of contract to advise, can be breach of retainer/contract. Also disciplinary proceedings.

Reasonable prospects of success

- Law practice prevented from providing legal services with respect to a claim or the defence to a claim for damages unless "legal practitioner...reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success" (s 345(1)).
- *Lemoto v Able Technical*- Unreasonable belief will be once which "unquestionably fell outside the range of views which could reasonably be entertained". Mere lack of success, taking on a difficult task not sufficient (*Lemoto*).
- Limitations including: advice given "as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable