

Authority of Lawyers under the Retainer

Actual Authority

- 1. *Definition*: A legal relationship between principal and agent (fiduciary) created by a consensual agreement to which they alone are the parties.
- 2. *Professional Rules*: A practitioner has an obligation to follow their client's instructions and cannot act without their instructions, unless to do so would be acting unlawfully or would be in breach of their overriding duty to the court.
- 3. *Scope*: Ascertained through application of normal contractual principles, the express words used and any associated conduct between parties.

Implied Authority

- 1. *All things incidental to the object of representation.*
- 2. *BUT no implied authority*:
 - a. To institute proceedings;
 - The mere fact that a lawyer is representing a client does not itself confer authority to institute legal proceedings on a client's behalf.
 - b. To settle proceedings;
 - c. To vary contracts, leases etc;
 - d. To conduct financial affairs.
- Exception for barristers:
 - "As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to instructions, or involve errors of judgment or even of negligence" (*R v Birks* (1990)).

Legal Services Commissioner v Jones (Legal Practice) [2015] VCAT

The lawyer represented six defendants in debt recovery matter but he had only received authority to act from two. The proceeding went to the Supreme Court and only two of the defendants had actually given authority. The lawyer claimed that he thought that the two defendants had authority from the other four to provide the lawyer with the consent to act. This misconception was reinforced by statements made by the accountant acting separately for all six defendants. In reality, the four defendants had not given authority to act on their behalf to the other two defendants. Therefore, the lawyer had no contract with those four.

Noted by VCAT: it was serious error to conduct proceedings without affirming that instructions had been given by all of the defendants. This is particularly serious given that there were potential differences between the various defendants as to their position (potentially a conflict of interest).

Lawyer pleaded guilty to one charge of professional misconduct and was found guilty. Taken into account:

- His guilty plea;
- His cooperation with the commissioner's investigations;
- He had apologised to the defendants for his error;
- No evidence that he had acted dishonestly; and
- No other disciplinary action in the lawyer's career.

Lawyer had to pay costs of the LSC.

Acceptance of Work

Solicitors – Accepting Retainers

- Solicitors have the freedom to accept or reject clients, but can rely on the **Duty to Act**.
 - Duty originally to protect client, now invoked to assist solicitors when acting in unpopular cases.
- Acceptance of client implies that the solicitor has the skill and capacity to take on the client.
 - Solicitor wants to ensure that they have the competence to take on the client's matter, particularly in light of recent trends towards specialisation where some lawyers are now highly specialised in particular areas of law.
- Cannot be rejected on basis of race, gender etc (*Racial Discrimination Act 1975 (Cth)*; *Equal Opportunity Act 2010 (Vic)*).

Barristers - Cab Rank Rule [See Week 5 handout]

- 1. ***Practising as a Barrister*** – Lawyers who practice solely as Barristers are required to accept a brief in any court and in any field in which they can practice: **Reg 17 Barrister's Conduct Rules**.
 - As long as the brief is within the barrister's:
 - Capacity, skill and experience; and
 - Available to work and not already committed to another engagement;
 - Fee is acceptable; and
 - Not obliged or permitted to refuse the brief under **Rules 101, 103, 104 or 105**.

- 2. **Not ‘absolutely’ imposing** — In *Giannarelli v Wraith*, it was explained that while the cab rank rule requires that barrister must accept work — they could raise their fees within permissible limits to remove such briefs.
- 3. Not a rule to ensure that barristers take cases, but a **rule to shield barristers** from criticism when they act for unpopular clients.
 - Eg. anti-terrorism cases.
- 4. Barristers used to only be able to accept matters from solicitors, but can now accept from clients directly: **Rule 21 direct briefs**.
 - **Rule 22** sets out the requirements of accepting direct briefs.
- “If access to legal representation before the courts was dependent upon counsel’s predilections as to the acceptability of the cause or munificence of the client, it would be difficult to bring unpopular cases to court and the profession would become a puppet of the powerful. If the cab rank rule were to decline, it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration to full vigour” (Brennan J in *Giannarelli v Wraith*).

Legal Costs

- Part 4.3 *Legal Professional Uniform Law*:
 - Legal costs must be **fair, reasonable and proportionate**, having regard to matters such as the complexity and urgency of the matter, quality of the work, instructions given and the experience of the lawyers involved (**s 172**) [see week 5 handout as to what is ‘fair and reasonable’ etc]
- 1. **Scope** — Legal work must be costed in accordance with script specified for both litigious and non-litigious work.
- 2. **Cost disputes** — ‘Whether the lawyer has charged fees grossly in excess of those which would be charged by lawyers of good repute and competency’.

Cost Disclosure Requirements

- 1. **Mandatory to disclose (s 174)**
- 2. **Must be written (s 180)** (disclosure is a contract: **s 184**)
- 3. **Must be fair and reasonable (s 172)**
- 4. **Must set out obligations when retaining a barrister (s 175)**
- 5. **Must set out arrangements for costs for settlements (s 177)**
- 6. **Must make clear that client can negotiate (s 179)**

Consequences for Non-Disclosure

- **s 178**
- Also possible proceedings for unsatisfactory professional conduct or professional misconduct.