Breaking up can be hard to do:

Can you be paid if you end the retainer early?

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THERE COMES A TIME IN SOME MATTERS WHERE YOU FEEL YOU CAN NO LONGER ACT FOR THE CLIENT, AND PARTING WAYS BECOMES THE FOCUS OF ATTENTION. CAN YOU END THE RETAINER UNILATERALLY? CAN YOU BILL THE CLIENT FOR THE WORK DONE? THE ANSWER TO THESE QUESTIONS IS NOT ALWAYS A SIMPLE YES. NOT GETTING THE ANSWER RIGHT CAN HAVE CONSEQUENCES, INCLUDING A POSSIBLE COMPLAINT TO THE SOCIETY AND RESULTING DISCIPLINARY ACTION.

Back to basics

When considering the entitlement to end a retainer you may need to start at the beginning. At its simplest a retainer is a contract for the provision of services. So the ordinary law of contract applies.

It is generally considered that a lawyer-client retainer, whether involving contentious or non-contentious work, is an entire contract[1]. Whether or not a contract is an entire contract is a matter of construction. If the contract provides for payment only at the end of the matter this may well evidence it is an entire contract. A "general" retainer that facilitates the lawyer providing multiple or different services over a period of time may more readily be construed as severable and not an entire retainer. This is more common in instances of sophisticated clients or commercial clients who want the convenience of a lawyer on retainer to provide advice in a variety of matters as and when they emerge. It would be uncommon for the average client to have a general retainer – they come to the lawyer with a specific problem or problems for which they need representation or advice. In some non-contentious matters (such as the administration of a deceased estate or property development) there is the prospect that it would not be considered an entire contract but rather construed as a series of retainers[2].

If the retainer is construed as an entire contract then this has a critical consequence for an entitlement to be paid; subject to the exceptions discussed further in this article, the starting position is that a law practice would only become entitled to its fees once the work under the retainer is complete.

What is the retainer?

It is not a requirement under the *Legal Profession Act 2006* (LPA) that law practices have a written retainer with their client. The LPA does afford law practices the opportunity to enter into a Costs Agreement with clients (provided they comply with the relevant sections of the LPA), and most law practices take the opportunity to incorporate into the terms of their Costs Agreement some recognition of the scope of the retainer.

In the absence of a written document, such as a Costs Agreement or a letter of retainer, the question of whether the retainer is an entire contract or not emerges from the oral communications between the lawyer and the client. In this situation the lawyer is at risk that a Court or Disciplinary Tribunal may later prefer a client's account of events or draw certain inferences and determine the retainer was something other than that asserted by the lawyer.

It is therefore important when you first accept a retainer from a client to give careful thought to identifying the scope of the work you understand that you have been retained to perform. It can be just as important to spell out what you aren't going to do as it is to outline what you are going to do.

The advantages of reducing this to writing are clear:

- The prospect of a client misunderstanding what you are and are not going to do is reduced if you have told them

in writing;

- If a dispute later emerges it isn't a case of "he said, she said", if the document clearly spells out the retainer (not just a broad based statement such as "civil proceedings" or "family law matters") it will speak for itself.

So who can end the retainer? And when?

In the majority of matters the retainer is fully completed; the lawyer does the legal work and the client pays the bill. Not all retainers however, will run their full course, for a variety of reasons. The entitlement of each party to the retainer to terminate is different.

For public policy reasons it has long been held that a client can terminate their lawyer's retainer at any time. This emanates from recognition that forcing a client who has lost confidence or trust in their lawyer to stay with that lawyer has an adverse impact on the administration of justice. This position is an exception to the ordinary principle requiring parties to complete their part of an entire contract.

But what about the practitioner? If the retainer is an entire contract then the primary position is that the practitioner cannot simply terminate the retainer; they must complete the work they were contracted to undertake. *The Rules of Professional Conduct and Practice* (the Rules) reflects that common law position of the obligation to complete the retainer, but also provides an exception to the ordinary principles.

Rule 5.1 specifically provides for three instances in which a retainer can be terminated by a practitioner as follows:

> A practitioner must complete the work or legal service required by the practitioner's retainer, unless:
>
> **5.1.1** The practitioner and the practitioner's client have otherwise agreed;
>
> **5.1.2** The practitioner is discharged from the retainer by the client; or
>
> **5.1.3** The practitioner terminates the retainer for just cause, and on reasonable notice to the client.

Rule 5.1

The first limb is recognition of parties' entitlement to vary or end their contract by agreement. The second limb reflects the public policy position of a client's outright entitlement to end the retainer without cause. The third limb is the critical one for a practitioner looking to determine whether or not they can get out of their retainer.

Neither of the terms "just cause" or "reasonable notice" are defined in the *Rules*. What constitutes just cause or reasonable notice will depend on the precise circumstances of the case. The emergence of a conflict of interest is a common basis for just cause in terminating a retainer. Dal Pont[3] outlines the following circumstances where the Courts have found that just cause existed:

- The client's acts or omissions are inconsistent with continuing representation, preventing the practitioner from properly performing his or her duties, such as where the client:
  - commits a significant breach of a written agreement regarding fees or expenses;
  - delays or refuses to pay the practitioner's fees in breach of a costs agreement;
  - makes material misrepresentations about the facts of the matter to the practitioner;
  - insists that the practitioner commit a breach of the law or professional rules;
  - gives a clear indication that the client has retained, or will retain, another practitioner to carry out the retainer;
- The client has been legally aided, the grant of legal aid is withdrawn or terminated and no alternate satisfactory arrangements have been made for fees;
- Continued representation would require the practitioner to breach professional rules (for example the practitioner is in a position of conflict between their own interests and that of their client, or it is likely the practitioner will be called as a witness on a material question of fact);
- A potential claim for negligence against the practitioner hangs on the outcome of the client's proceedings;
- Continuing representation is likely to have a seriously adverse effect upon the practitioner's health; or
- The client or the practitioner has died or become insane.

The amount of time required to constitute "reasonable notice" will also vary from case to case. This would likely be assessed having regard to impending deadlines in the matter, such as an approaching court date or limitation period. The nature of the next Court date could arguably also impact on what would be considered reasonable; for example more notice may

be considered necessary for an impending two week trial than for an ordinary directions hearing.

It is also important to bear in mind that in some jurisdictions the Court has its own proscription of the timeframes for simply giving notice that you are ceasing to act or where you are required to formally seek the leave of the Court. In the Supreme Court, leave of the Court is required to file a notice of ceasing to act after the proceedings have been set down for trial[4], and in the Local Court a notice cannot be filed without leave of the Court within 56 days before a hearing of the proceeding[5]. In the federal jurisdictions, in the absence of leave by the Court, a practitioner must give their client seven days' notice before they file a notice of ceasing to act with the Court[6]. However, these various rules are not necessarily the period to satisfy the requirement of reasonable notice under Rule 5.1.

So you're ending the retainer – are you entitled to send a bill?

The answer to this question is not always yes; even if you have ended the retainer with just cause and on reasonable notice. It may depend on whether you have an entitlement to recover fees on a quantum meruit basis or if the client had received any benefit from the work that you have already done. If you terminate a retainer without just cause you cannot recover payment of your fees even on a quantum meruit basis[7].

If the client terminates an entire retainer or the retainer is terminated by agreement between the practitioner and the client, then the practitioner may be able to claim for their fees for the work done on a quantum meruit basis until the termination. The practitioner would need to demonstrate that there was some benefit to the client from the work done and the work is not valueless due to the practitioner's negligence. It may also depend on the terms of the retainer, particularly in the instance of "no win, no fee" retainers[8].

Alternatively the unilateral termination of a retainer by a client can be construed as a breach of contract, preventing the practitioner from performing the contract, or breaching an implied duty upon the client to do all necessary acts to enable the other party (the practitioner) to have the benefit of the contract[9].

An exception to the usual position that no payment is due until satisfaction of the entire retainer occurs if there is express permission to the contrary. An example of this is the practice of including provisions in a costs agreement to allow for periodic billing throughout the retainer. If the retainer expressly provides for this, the practitioner can bill and be entitled to recover their fees during the ongoing conduct of the work rather than the entitlement to fees only arising at the completion of the retainer.

If you terminate a retainer in reliance on Rule 5.1.3 then there must be some benefit to the client for any work that you issue a bill for, otherwise you could potentially find yourself facing an allegation of charging for fees where none were payable, as was the situation in the case of *Legal Services Commissioner v Baker (No 2)*[10].

The Baker case

In the case of *Baker*, the practitioner faced a number of disciplinary charges which included a charge of wrongfully charging a client, Ms Robertson, professional costs and disbursements in circumstances where none were chargeable, and a further charge of dishonestly rendering Ms Robertson an account which was not in accordance with the retainer.

Ms Robertson retained Baker's firm to act for her in personal injury and property damage claims. A "no win no fee" costs agreement was signed. After limited contact with the firm she was notified that the firm had a conflict of interest and could no longer act for her in the matters. Baker rendered an invoice in the amount of $1,312.57 for the work undertaken by the firm. He subsequently issued and vigorously pursued proceedings to seek to recover this amount from Ms Robertson.

The Court considered the conflict of interest a "frustrating event" that discharged the parties' obligations, but further found it did not give rise to an entitlement for Baker to recover fees. Baker was found guilty of professional misconduct in respect of both of the charges relating to Ms Robertson.

On the particular issue of the entitlement to recover fees, McPherson JA, with whom Jerrard JJA and Douglas J agreed, said the following:

> [29] This raises the question of whether or not the firm was entitled to claim fees for work done before the frustrating event occurred. It falls to be determined according to the general law of contract. On the strength of a passage in Dal Pont, Lawyers' Professional Responsibility, (2nd ed., 2001), at 54, that a solicitor who determines a retainer for just cause is entitled to recover his fees to date, his Honour concluded that there may have been some fees due from Ms Robertson to the firm for work done by the firm prior to the termination notice given on 13 October 1999. The principle of law applicable in such circumstances was laid down in Appleby v. Myers (1867) L.R. 2 C.P. 651. It is that, when

by force of a supervening event for which neither party is responsible an entire contract becomes impossible of performance, both parties are discharged from further performance, but the performing party is not entitled to payment for the work done because it was never completed. It is, said Blackburn J. in that case (L.R. 2 C.P. 651, 659), "a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither".

[30] It may be accepted that, to the extent that one party has before discharge done work of which, after the discharge of the contract by frustration, the other party takes the benefit the latter may be liable in restitution for that benefit or its value. Mr MacSporran S.C. agreed that the Robertson case was conducted before the Tribunal here on the basis of the passage in Dal Pont. It is, however, one matter to say that a solicitor may be discharged from his retainer whenever "just cause" exists or arises; it is another to say that he thereupon becomes entitled under a contract of retainer that is entire to recover fees for the work done. The decisions on which Professor Dal Pont relies do not in my respectful view support such a conclusion. They are *Ex p. Maxwell* (1955) 72 W.N. (N.S.W.) 333, at 337; *Cachia v. Isaacs* (1985) 3 N.S.W.L.R. 366, at 377–378; and *Caldwell v. Treloar* (1982) 30 S.A.S.R. 202, at 209. The first two decisions were concerned not with the right to recover fees where the retainer work has not been completed but with the question whether the solicitor is discharged from his retainer by the happening of such circumstances. The South Australian decision related to a case not of an uncomplicated action at common law like this, but of a retainer in respect of a series of matters in the administration of an estate over a lengthy period of time. It was held not to attract the rule governing entire contracts.

[31] It may be asked why a solicitor should be compelled to forego charges for work done under a retainer which, through no fault on his part, has been brought to an unexpected and premature end. It may equally well be asked why in the same circumstances the client should be obliged to pay for it. The answer lies in the character of a contract to do work on a "no win no fee" basis. In that respect it resembles to some extent a "no cure no pay" agreement for salvage services in Admiralty in which no payment is recoverable unless the salvage efforts are successful: cf. *Kennedy's Civil Salvage*, (4th ed., 1958), at 335. If you make an agreement like that, you are stuck with it. The analogy between the risks of litigation and the perils of the sea may not be wholly inappropriate.

[32] It may be accepted, as it was in this instance, that the client will be liable in restitution for work done of which the client takes advantage after discharge of the retainer. There are statements in *State Rail Authority of New South Wales v. Codelfa Construction Pty Ltd* (1982) 150 CLR 29 supporting the existence of such a principle, which explains his Honour's reference to "items of work which will not need to be duplicated by the new solicitor". Several comments are apposite. One is that the question is not whether some work has been done that there is no need to duplicate, but whether in fact the client received and made use of the benefit of that work. See *Sumpter v. Hedges* [1898] 1 Q.B. 673, 676. Attwood Marshall succeeded to the firm's retainer, but it is not clear precisely what items of work, if any, were made use of by them, and on what terms. A letter dated 23 February 2000 from Baker Johnson observes that there has been no correspondence from those solicitors to obtain the firm's records "which are held in connection with the matter". The implication at that stage is that no use was made by Attwood Marshall of any work the firm had done for Ms Robertson. Ordinarily the integrity of the "no win no fee" retainer is preserved by the two firms agreeing that on completion of the matter the fees due to the former will be paid out of the proceeds of litigation, if any, coming to them, or at least that they will notify their predecessors of that event. Whether that in fact occurred here it is not, on the evidence, possible to say. The material in the record is not sufficient to enable a conclusion to be reached that anything was

Food for thought

Some tips that may help you navigate the risks of recovery of fees in the event you need to terminate a retainer before it's completed:

- **Review how you formalise the scope of a client's retainer.** Does your firm utilise a Costs Agreement or a written letter of retainer?
- **When accepting a new retainer consider carefully what the scope of the retainer is.** Communicate clearly to the client the work you are agreeing to do and, if relevant, spell out what work you consider is not part of the retainer.
- **Review your firm's precedent Costs Agreement.** Does it provide for billing during the course of the retainer? Does it adequately set out the scope of the work to be done?
- **If a problem arises, communicate with your client.** Explain the reasons for any difficulty completing the retainer and if appropriate seek their agreement to end your involvement in their matter. Steps such as assisting the client to find a replacement legal representative may smooth the path for you to extract yourself from the retainer with the client's agreement.
- **Review your billing practices.** This could include ensuring employed staff are aware that there may not always be an automatic entitlement to fees if the firm has to cease acting, having a process for a principal of the firm to assess if there is any potential argument that the firm isn't entitled to its fees, development of a checklist that may assist with implementing the necessary processes to ensure the practice, and the principals, aren't caught out.

due to the firm from the client on this or any other basis. ●

Endnotes

1. *LexisNexis Butterworths, Halsbury's Laws of Australia, Vol 16 (at 22 August 2013), 250, Legal Practitioners, 'Lawyer-Client Relationship' [250-1195]*
2. *Quick, R. Quick on Costs, Volume 1, 3. Solicitor and Client Costs, Creation and Duration of Retainer, [3.1170], Thomson Lawbook Co (loose-leaf service)*
3. *Dal Pont, GE. (2013). Lawyers' Professional Responsibility. (5th ed.). Sydney, Australia. Thomson Reuters at [3.195]*
4. *Supreme Court Rules (Northern Territory) Rule 20.03*
5. *Local Court Rules (Northern Territory) Rule 40.04*
6. *Federal Court Rules 2011 (Cth) Rule 4.05, Family Law Rules 2004 (Cth) Rule 8.04, Federal Circuit Court Rules 2001 (Cth) Rule 9.03*
7. *Smits v Roach (2004) 60 NSWLR 711*
8. *LexisNexis Butterworths, Halsbury's Laws of Australia, Vol 16 (at 22 August 2013), 250, Legal Practitioners, 'Lawyer-Client Relationship' [250-1210]*
9. *Adamson v Williams [2001] QCA 38*
10. *[2006] 2 Qd R 249*

Princess Margaret Hospital for Children

Donation Appeal from Tass Liveris

On 10 November 2013 I am running the Athens Classic Marathon. The race begins at the site of the Battle of Marathon and tracks the route to Athens run by the soldier Pheidippides in 490 BC to deliver the message that the Persians had been defeated in that Battle and then finishes at the iconic Panathenaic Stadium, the site of the first modern Olympics in 1896.

I will run the marathon in memory of my godson and my sister Flora and brother-in-law Geoff's son, Marcos Andreas Agapitos Michael, who was born in Perth on 19 April 2013 and who passed away on 25 April 2013. Marcos profoundly touched the lives of everyone who met him and many more. It has long been said that marathon is the oldest test of endurance, strength and will however in the short time that we had with Marcos he redefined courage and bravery for us in ways that will never fade.

In taking on this challenge I am also raising funds for the Princess Margaret Hospital for Children, which provides specialised medical care to babies and children in Western Australia. All funds raised will be used at the Intensive Care Unit where Marcos was looked after. You can support my marathon effort and the PMH Foundation by making an online donation at **http://www.pmhfoundation.org.au/tass_liveris**.

Thank you for your donation and for sharing the road to Athens with me.