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If your lawyer sacks you- Can they get paid?

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If Your Lawyer Sacks You – Can they get paid?

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A ***retainer*** or contract between a lawyer and a client to pursue litigation will often be an ***entire*** contract; that is, the lawyer contracts to continue working on the case until completion, whether by early negotiated settlement or judicial determination in court[1]. Parties to any contract can always determine it early, by mutual agreement, or in accordance with some contractual provision on which they had agreed. A lawyer committed to an entire contract can also terminate a contract early after breach by a client, or for other good cause. Otherwise, the lawyer is obliged to complete the work. Let us consider whether or not a lawyer who terminates a retainer with a client early can claim some payment of her or his costs for the work done to that point.

Breach of contract by client

Where the client has failed to pay the lawyer's professional costs (the fee charged for her or his services) or disbursements (amounts the lawyer has paid out on behalf of the client which the client must reimburse such as search fees in a property purchase) as agreed in the contract, or is unable or unwilling to pay, the lawyer can justly refuse to keep working[2]. There may be other reasons why the lawyer should be entitled to stop work. The client may refuse to provide instructions, or may leave her or his address, so the lawyer cannot find her or him to ask for more instructions in order to decide what step to take next.

You might be surprised to think that this happens, but litigation can be lengthy and frustrating. Sometimes clients lose interest, but they think they can leave it in the hands of their lawyers. Unfortunately, from time-to-time, as the parties opposing the client take steps in the litigation, alternative courses of conduct must be considered by the client. The client must decide which way she or he wants the matter to progress. The opponents may even offer to settle, and the client must be the one to decide whether the offer is good enough to satisfy the client. The lawyer can and must advise the client, but cannot decide for the client. If the client is unwilling to provide instructions to the lawyer, the lawyer can stop work.

The relationship between lawyer and client is also one of great trust and reliance. Sometimes, in the media, we see criticism of lawyers for breaking that trust. The media does not generally report when a client breaks that trust, but this happens too. Sometimes, clients lie to their lawyers. Sometimes the lawyers discover the client is using them to cheat – to break the law, or trick their opponents in court. Lawyers must never allow this. They cannot be a party to such behaviour because of the high obligation they owe to the courts to be always honest. Lawyers play a fundamental role in the administration of justice and upholding the rule of law. Where a client lies to a lawyer, and the trust between them is broken, an unspoken aspect of the agreement between them – an implied term of the contract – is breached, and the lawyer may cease to act. Sometimes, the matter can be discussed, and the client persuaded to act lawfully, so the lawyer continues to represent the client. Other times, the contract must be terminated.

Other good cause

Other circumstances will also justify the lawyer stopping work early despite the agreement to work until the case is finished. While these are not generally set out in the contract, like the one already mentioned where the client fails to instruct the lawyer, they are the subject of implied terms in the contract. The courts, in effect, consider that this matter must be an unspoken point of agreement between the parties, or something anyone would have agreed had it been considered in advance. Actually, the judges do not imagine how these specific people would have thought and acted when they imply terms into contracts, but they consider the law of contract objectively and decide that, as a matter of general principle, contracts of this nature should be subject to these exceptions.

So, in the case of contracts between lawyers and clients, courts allow for early termination of an entire contract in the following events.

1. Where a conflict has arisen, such that if the lawyer continues to act for one client, she or he must necessarily act against the interests of another client[3]. In that event, the solution is to refer each of the clients with conflicting interests to other lawyers (in different law firms) to complete the work. This is a nuisance to the clients, but is a reasonable way of solving the dilemma to achieve the best outcome for all the parties involved.

2. In criminal cases, where an innocent client who had been insisting to her or his lawyers that she or he was innocent, changes her or his story and confesses guilt to the lawyer. If that client still wants to plead not guilty, the lawyer is allowed to say "you have lied to me, I am no longer comfortable representing you before the court, please find a new lawyer".[4] Sometimes, after talking it through with the client, the lawyer will keep acting. Whether the first lawyer continues to act, or another takes over, they must not mislead the court. Even where a client comes to a lawyer in the first place and admits guilt but wants to plead not guilty, that is permitted under the system of criminal justice. In such cases, the defence team cannot tell lies to the court, or suggest an innocent person is guilty, but they can insist that unless the prosecution case proves the client's guilt beyond reasonable doubt that she or he must not be convicted. That is a matter for another article! The next good ground for early termination of a retainer is related to this.

3. Where a client insists that a lawyer take some improper step, such as lying to court or falsifying a document, the lawyer must not accept such instructions. If the client will not agree to the lawyer conducting the case entirely within the law, the lawyer must stop acting. The contract must be terminated.[5]

4. Obviously if the client has already caused false evidence to be given – by lying in court, or getting someone else to give false evidence, of lying to the lawyers and causing them to create and use false documents, unless the client authorizes the lawyer to correct the falsehood, the lawyer must stop acting.[6]

5. If the lawyer somehow becomes a witness in a court case then she or he cannot also keep acting as a lawyer in that case.[7]

6. Of course, if the lawyer dies, she or he cannot complete the contract and it would be terribly unfair to allow the client to sue the lawyers estate for damages for breach of contract is this event. The same might be said where the lawyer becomes seriously ill and cannot continue the work.[8]

Payment for work done

While it may be obvious in these last cases that the courts should not allow clients to sue the lawyers (or their estates) for failing to finish the job, it is not as clear whether the lawyers (or their estates) should be able to send the clients a bill for the work done to date, when they stop work before the case is finished.

Under the 'entire' contract

As a matter of principle, we have already noted that the courts consider contracts to conduct litigation entire contracts; the lawyers are obliged to finish the job they took on. Generally, one cannot recover payment for work done under an entire contract unless one completes the job. The deal was to do all the work, and only then does an entitlement to be paid arise. Even if a lawyer dies on the job, it might not seem fair to allow her or his estate to recover for the work done so far, if she or he has failed to complete the job – because that was what was promised.

The courts have considered this in cases involving some of the events we have noted as "good cause" to stop work early. Because there are legally compelling or permissible reasons to terminate the contract early, the courts have held that the lawyers may be entitled to be paid something for their work. They cannot claim under the contracts, because they have not honoured their bargains. However, it would be unfair for the client to take all the benefit from the work done, and not have to pay some fair compensation for that work.

Claim for payment based on fairness

Before we proceed, let us imagine that the client fires the lawyer before the case is over. First, we must note that a client is always allowed to fire a lawyer. Normally, people who enter into contracts with workmen must honour them, or pay damages for breach of contract. Because of the necessary trust and reliance a client must place in a lawyer, the law allows the client to fire the lawyer whenever she or he feels unable to trust and rely on the lawyer. Even if there is simply a personality clash, or the client likes another lawyer better or is being foolish, the lawyer and client relationship is such a special one that the law allows the client to fire the lawyer. Where a client terminates a contract without good cause, however, even if it is an entire contract, it would not be fair or reasonable to allow the client to thereby avoid payment for work done. If that was the case, all mean or greedy clients would fire their litigation lawyers minutes before a judgment was given and avoid any fees – even where the lawyers have done a wonderful job for them. Still, the contract is over, so the lawyer cannot claim under the contract.

The courts have said that where the client fires the lawyer although the lawyer has done nothing wrong, the lawyer is entitled to claim for work done to date based on a ***quantum meruit*** – which literally means *quantifying* (calculating) the amount to be paid based on an objective assessment by the court of the merit of the work done.[9] In other words, the courts will award to the lawyer what is a fair payment for the work done prior to termination of the contract. This may not be exactly what would have been calculated under the terms of the contract. Of course, any lawyer's contractual payment must be fair and reasonable, or the client can apply to have the amount reduced, so there should not be a vast difference in what she or he would have been paid for that portion of the work under the contract, and the quantum meruit award.

Now, what if the lawyer terminates the contract? If she or he simply breaks the contract, she or he should recover nothing. That lawyer has done the wrong thing, and cannot benefit from the client who has been mistreated. If, however, the lawyer has good cause to stop work, then the courts will allow recovery for work to date on a quantum meruit basis. The contract cannot be relied on, but work has been done and benefit received, so the person who both sought and received that benefit must, to be fair, pay for the work done.[10]

Quantum meruit claims, as they are traditionally called, are allowed in other circumstances where parties have entered into entire contracts, but one prevents the other from completing the work and claiming the contractual payment. The principle which justifies this is called *restitution*. The party seeking and receiving benefit must restore the "loss" to the other party who provided that benefit.

Speculative contracts

Finally, let us consider one further complication. You will have seen advertisements by lawyers who offer no-win-no-fee deals. Frequently, this relates to personally injuries cases. Some poor person has suffered an unexpected injury, and because of the injury, cannot work for a period. That person may be now be suffering from the physical consequences of the injury and also be suffering financial difficulties. She or he may want to find out if it is possible to recover for the loss from someone, but be too worried about the cost of litigation to risk seeking recovery. Some lawyers offer to take that risk on themselves. They may offer free consultation in the first place, and where they think the case has reasonable prospects of success, they agree to pay all the expenses involved in running the case, and ask for no payment for their own fees, unless and until the case has been won. This can be a wonderful public service for poor people who have legitimate claims against wrong-doers.

This type of contract is speculative for the lawyer – who may recover nothing and be out of pocket if the case fails. In most parts of Australia (except South Australia) lawyers can never take a "cut of the winnings". They do not get paid a percentage of what the client recovers, only a fair fee for work done, and that only if the client recovers from the alleged wrong-doer. This is a type of entire contract too.

The deal is that the work must be completed before payment is due. But there is more – not only must all the work be done, but it must result in a success for the client. If the case goes to court and the client loses, the lawyer gets no fee.

In this case, then, what if the lawyer terminates the contract before the case is finalized? Clearly, if the lawyer breaches the contract she or he cannot recover for the work done to date, and is liable to the client for damages for breach of contract. If the lawyer terminates for *good cause*, should she or he get paid anything? Imagine if she or he finds out that the client is only pretending to have a back injury. That lawyer cannot persist in that case. To continue to press the case would be fraud. The lawyer must stop work. Is it fair to allow the client to rely on his or her own wrong-doing and refuse to pay because the case was not successfully completed? Surely not. So in this case also, it is suggested that the courts would apply restitutionary principles and allow the lawyer to recover fair costs for work done, and for disbursements paid on behalf of that client.

In other circumstances, the lawyer may not recover. Imagine the lawyer agrees to act for someone injured in a car accident. Next day that lawyer agrees to act for another person involved in a car accident. What if the lawyer has been careless and has agreed to act for the two parties involved in the same accident who want to sue each other? That lawyer must cease acting for both clients and refer them to new, independent lawyers. No matter how much work that lawyer has done for each client, it would not be fair to recover anything for the work done. The contract is entire and has not been completed. The lawyer cannot recover anything under the contract.

The contract had to be terminated early because the lawyer was negligent in taking on both clients. There is no justification for a restitutionary claim in this circumstance. Quantum meruit applies where it is unfair to leave the worker unpaid and allow the other party to take a free benefit. In this instance the benefit to the clients is minimal, and off-set by the trouble and inconvenience of starting from the beginning again with a new lawyer, and all because the first lawyer was careless. The lawyer who is careless cannot claim it is unfair that he not recover.

Final thoughts

Contracts entered into by consenting adults setting out the mutual terms of agreement are generally binding. Sometimes, unforeseen events occur which would make the strict operation of the contract unfair. In some types of case, the courts intervene, either by implying terms into contracts to modify their operation, or creating a remedy, like quantum meruit or 'restitution', outside the contract. These variations are intended to ensure fair-play. Thinking back over the various circumstances outlined above which may affect lawyer and client retainers, it seems that the courts have achieved a fair balance.

Further reading

You might like to read some parts of the new legislation governing legal practitioners. The Attorneys-General across Australia have devised new rules which are set out in "Legal profession – model laws project: Model Provisions (28 June 2004)".[11] This new law is intended to operate in all parts of Australia, and already is in force in NSW, Victoria and Queensland.[12] There are provisions in the Acts (or a related Act in Queensland) which regulate to some extent professional costs. The Acts require extensive explanation of costs arrangements by lawyers and provide that clients can always have their bills reviewed by an independent body to ensure lawyer's costs remain fair and reasonable.

Absent clear agreement, they provide that lawyers may recover fair and reasonable costs.[13] It is possible that the New South Wales and Victorian sections may be interpreted to modify the common law approach set out above, and allow lawyers to recover part costs even where they terminate contracts early without good cause. The Queensland Act is less likely to be so read. In any case, fair and reasonable costs *in all the circumstances*, where a lawyer terminates an entire contract (especially a speculative one) early without good cause, are likely to be nothing. Hopefully, however the provisions are interpreted, the tribunals responsible for supervising lawyer's costs will continue to maintain the fair balance between the rights of lawyers and clients so far achieved by the law as outlined above.

Appendix – costs recovery sections in NSW, Vic and Qld law (emphasis added)

Legal Profession Act 2004 NSW s 319

(1) Subject to the provisions of this Part, legal costs are recoverable:

(a) in accordance with an applicable fixed costs provision, or

(b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or

(c) if neither paragraph (a) or (b) applies, according to the **fair and reasonable value of the legal services provided.**

Queensland Law Society Act 1952 (as amended) s 48I

(1) The maximum amount of fees and costs a practitioner or firm may charge and recover from a client for work done isó

(a) an amount calculated in accordance with the client agreement between the practitioner or firm and the client for the work; or

(b) if there is no client agreement and there is a scale for the work provided under an Act – an amount calculated in accordance with the scale; or

(c) if there is no client agreement and there is no scale for the work provided under an Act – **an amount assessed as a reasonable amount** for the work by a tribunal costs assessor.

Legal Profession Act 2004 Vic s 3.4.19 Subject to Division 2, legal costs are recoverable –

(a) under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law; or

(b) if paragraph (a) does not apply, in accordance with an applicable practitioner remuneration order or scale of costs; or

(c) if neither paragraph (a) nor (b) applies, **according to tbe fair and reasonable value of the legal services provided.**

References

1 *Underwood, Son & Piper v Lewis* [1894] 2 QB 306; In *Caldwell v Treloar* (1982) 30 SASR 202 the court also accepted this principle but held it not to apply in the circumstances of the particular case.

2 *Underwood, Son & Piper v Lewis* [1894] 2 QB 306; *Ahmed v Russell Kennedy (a firm)* [2000] VSC 41; Caldwell v Treloar (1982) 30 SASR 202 regarding failure to pay disbursements, in this instance counsel's fee.

3 MRA Rule 8.4 client conflicts, rule 9.2 conflict with own or associate's interests

4 MRA Rule 15.2.

5 Supported by dicta of AL Smith, LJ in *Underwood, Son & Piper v Lewis* [1894] 2 QB 306; also by the court in *Adamson v Williams* [2001] QCA 38, although this case concerned allegations of impropriety by the solicitor justifying termination of the retainer by the client.

6 MRA Rule 15.

7 MRA Rule 13.4.

8 The Professional Conduct Rules of Western Australia provides for withdrawal from representation in R 17.3(b): "if the practitioner reasonably believes that continued engagement in the case or matter would be likely to have a seriously adverse effect upon his health"; Cf contra dicta in *Underwood, Son & Piper v Lewis* [1894] 2 QB 306.

9 *Caldwell v Treloar* (1982) 30 SASR 202; *Adamson v Williams* [2001] QCA 38.

10 *Pavey & Matthews P/L v Paul* (1987) 162 CLR 221; *Smits v Roach* [2004] NSWCA 233

11 Draft Model Provisions provided by the Parliamentary Counsel's Committee to the Standing Committee of Attorneys General for consideration at its meeting in July 2004 http://www.lawcouncil.asn.au/natpractice/currentstatus.html, downloaded 5.2.05.

12 *Legal Profession Act 2004 NSW; Legal Profession Act 2004* Vic; *Queensland Law Society Act*, and see provisions in Northern Territory imposing "fair and reasonable" requirement: s 119ff *Legal Practitioners Act* 2004.

13 See s 319 *Legal Profession Act* 2004 NSW, s 3.4.19 *Legal Profession Act* 2004 Vic, s 481 *Queensland Law Society Act*.