Tips to avoid breaching the 'no-profit' rule

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Lawyers should check their retainer agreements to ensure that they do not contain provisions which breach the "no profit rule". The following is a very brief overview of the no profit rule and what practitioners need to do to ensure that they do not breach it.

The lawyer-client relationship is a fiduciary one in which the lawyer is bound by certain obligations or duties. One of those duties is that the lawyer must not profit from the fiduciary position (see *ASIC v Citigroup* (2007) 62 ACSR 427 at 289).

This includes receiving benefits or **profits** which came about as a result of the fiduciary relationship. If the fiduciary (the lawyer) makes a profit by virtue of the role as fiduciary, the fiduciary must inform the principal about this profit and obtain the principal's consent before keeping it. If the principal's informed consent is not obtained, the subject profit may be considered to be held by the fiduciary on constructive trust for the principal, and thus is payable to the principal on their authority.

Money or benefits that are received by a lawyer as a reward for referring a person or entity to someone else is a clear example of where the no profit rule would be breached unless the client's informed consent to the lawyer retaining that fee or benefit is obtained (Australian Solicitors' Conduct Rule 12.4.3).

Gaudron and McHugh JJ in *Breen* said the following:

> *In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed* (54 (1996) 186 CLR 113).

However, the situation is more complex when considering what the client is being told that they have to pay their lawyer.

In general, lawyers are only entitled to profit from the fiduciary relationship via the receipt of fair and reasonable fees in exchange for competent legal services. As long as those fees are properly disclosed to the client and the client has given their informed consent to those fees being retained by the lawyer, then the no-profit rule will not be breached.

Lawyers are also entitled to the reimbursement of reasonable expenses that are incurred in the course of the provision of competent legal services. These include administrative items such as the cost of phone calls, fax, postage, copying and printing and legal disbursements such as counsel fees and the cost of obtaining expert reports.

Such charges that are passed on to the client must have been actually incurred by the lawyer and must not involve any profit or benefit to the lawyer. That is, the lawyer can only charge the client what the item cost the lawyer. In cases of doubt or ambiguity, the Supreme Court Scale provides a sound basis for many of the administrative charges associated with the provisions of legal services.

Where lawyers tend to err, is where they charge clients fees for non-legal services such as opening of files, attending on trust transactions or even for administrative actions by non-lawyers.

The imposition of such fees raises two issues:

Firstly, such fees may be deemed to not be fair and reasonable and are therefore vulnerable to being set aside by the courts - particularly so if they relate to time spent in the satisfaction of administrative functions and/or statutory obligations as referred to above.

Secondly, such fees may offend the no profit rule and may therefore constitute a breach of a fiduciary duty.

The only way a lawyer is able to escape liability for a breach of a fiduciary duty is if the conduct was undertaken with the fully informed consent of the client to whom the duty is owed. The client can only give informed consent if there is full disclosure by the fiduciary to the client of all material facts and information that could affect the decision to give the consent.

It is validly argued that the role of contract in setting the parameters of fiduciary obligations is evidentiary in nature. One of the ramifications of such a view is the idea that informed consent is effectively the same as contracting out of your ordinary fiduciary obligations. Both concepts involve a voluntary variation of the terms of the fiduciary relationship.[1]

This would accordingly involve the lawyer providing to the client a detailed explanation of the basis for the fee and why it is fair and reasonable under the circumstances, and also informing the client that the charging of the fee constitutes a breach of the fiduciary duty which requires their consent.

Finally, it is worth noting her Honour's observations in *Modtech Engineering Pty Ltd v GPT Funds Management Holdings Ltd (No. 2)* [2013] FCA 1163 where she said the following:

> *First, it should be recognised that a lawyer's hourly rate includes a component for the fixed overheads of the firm. Those overheads will ordinarily include, inter alia, the costs associated with utilities bills, internal printing and photocopying, information technology systems and employee wages. In the absence of any specific agreement to the contrary, it is inappropriate for lawyers to seek to "double-dip" by charging clients for those overhead costs as disbursements.*
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> *Secondly, costs of an unusual sum or nature are not allowed as between solicitor and client unless they have been authorised by the client after full disclosure, including the fact that they might not be allowed as between party and party: see, by way of example, Re Blyth and Fanshawe (1882) 10 QBD 207 at 210 and 212 and Dal Pont GE, Law of Costs (3rd ed, LexisNexis Butterworths, 2013) at [5.26]- [5.32].*

If you want to know more about this subject, or you want help with reviewing your retainer agreement please do not hesitate to contact Ethics and Practice at the Law Society. B

Endnotes

1 Daniel Reynolds, "The merely evidentiary role of contracts in ascertaining the scope of fiduciary obligations' (2020) 48 *Australian Bar Review 386*