The Butler Bulletin

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Why Do Lawyers Ask for Retainers?

A retainer is a sum of money the client pays upfront to the lawyer before any work has begun on the file. Depending on the type of work being done, this amount could be anywhere from a couple hundred to a few thousand dollars. These funds are held in the lawyer's trust account, which means they are kept in a bank account that is separate from the firm's operating account, and the funds can only be used for your invoices. Although there may be retainers from several clients in the trust account, there are strict recordkeeping regulations that ensure the lawyer knows how much money belongs to each person.

So if the funds aren't being used right away, why do lawyers ask for retainers?

A retainer allows the lawyer to focus on the work, rather than on collecting amounts owing.

Your lawyer's time is most effective when it is spent working on your case. Any time that your lawyer has to spend on chasing invoices is taken away from productive hours. Even if your bill isn't the issue, any time your lawyer has to take out of the day to track down overdue payments is time that can't be spent working on anybody's file.

HST on all invoices is due quarterly or monthly, even if the bill hasn't been paid.

Most firms remit their HST quarterly, and some remit monthly. As soon as your invoice is issued, the HST is included in the amount that must be remitted. This is true whether or not your invoice has been paid. Since not all invoices are paid the day they are issued, there is a difference between the amount owing and the amount received. With a retainer, the lawyer can issue the invoice, pay the invoice from the retainer, and remit the HST without paying HST that has not yet been collected.

A retainer ensures the bill will be paid.

We've all heard the expression about one bad apple spoiling the bunch. Every lawyer has had a client who did not pay their bill. This may be due to a lack of funds, a disagreement between the lawyer and the client, or an oversight on the part of the client. In any case, having a retainer ensures the bill gets paid in a reasonable amount of time. The vast majority of clients pay their bills within the required timeframe, but because some people haven't, many lawyers adopt a policy that all files have retainers.

The client doesn't have to constantly pay bills

When a lawyer has a retainer, he or she can use those funds to pay invoices as they arise, provided the invoice has been given to the client. A retainer means the bills can be paid easily, rather than the client constantly having to make trips to the office or rack up credit card charges.

DETERMINING CAPACITY WHEN SOMEONE IS BEING TREATED AT THE HOSPITAL

Frequently we receive calls from people who have a family member in the hospital who wants to make their estate planning documents. Usually the person wants a will, but sometimes they also want to put an Advance Healthcare Directive and Enduring Power of Attorney in place.

For anyone to give instructions for these documents they need to have capacity. This is true whether or not the person is in the hospital when they decide to have the documents made. However, there are some additional factors that need to be taken into consideration when making documents in a hospital.

Medication

Unlike most meetings, when a lawyer is visiting someone in the hospital there is a possibility that the client is medicated with strong drugs, like painkillers. The person might normally have his or her capacity, but substances like morphine can alter a person's ability to fully understand what is going on.

Undue Influence

It is incredibly easy to take advantage of someone who is in the hospital. Not only is the person there for medical treatment, but they also likely aren't getting enough rest, are stressed, and are afraid of what might happen to them. Add in some medications and you have a recipe for undue influence.

Communication

Sometimes communication issues are misdiagnosed as incapacity. For example, when someone can't hear the question properly, they might give an answer that doesn't make sense. Alternatively, there might be a physical reason that prevents the person from communicating in their usual way, such as an injury to the vocal chords.

It is important that the lawyer takes all possible steps to determine whether the person is struggling due to one of these factors, or if he or she has lost their capacity.

What's the difference between "lawyer" and "attorney"?

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While often used interchangeably, these two terms have very different meanings. Much of the confusion surrounding these words stems from the fact that a lot of the media consumed in Canada is American. As a result, a large portion of people's legal vocabulary comes from American TV shows, movies, and blogs.

In the USA, the term "attorney" is short for "attorney-at-law". This means the person you hire to complete legal work, who has been to law school, called to the bar, and who is licensed to practice law.

The Canadian equivalent is "lawyer". More and more often Canadians are referring to their lawyers as attorneys. Not only is this the incorrect term, but the title "attorney" refers to something else entirely in Canada.

"Attorney" in Canada does not mean a fancy name for "lawyer". An attorney is the person appointed under a document called *Power of Attorney*. This person is appointed to make financial decisions on behalf of someone else.

As with any legal situation, precision is incredibly important. Someone's responsibilities in Canada as an attorney are vastly different from a lawyer's responsibilities.

Unfortunately, most people don't realize there is a difference. Although the everyday terminology doesn't have an impact on most people, any legal representative should be aware of the difference.

Questions from our readers:

"I'm supposed to receive money from an estate, and I've filed for bankruptcy. Do I still get my inheritance?"

This is a question Lynne sees on her blog pretty frequently. Here is an excerpt of one of her posts addressing this topic, from www.estatelawcanada.blogspot.ca :

A discharge of bankruptcy is an order of the court that says that the bankrupt person has fulfilled his or her obligations under the bankruptcy proceedings. Either all debts have been paid, or more likely, the property that was available for paying debts was divided up among creditors so that they were paid in part. While a person is undergoing the process and the court has not yet discharged him or her, any surplus income not needed for essentials is paid to the trustee in bankruptcy to be divided among the creditors.

If the person who is in bankruptcy is the beneficiary of an estate of someone who passed away, the bankrupt person's entire share of the estate will go to the trustee in bankruptcy. The trustee will use as much of the inheritance as is needed to pay all of the debts, even if this means the whole inheritance. If the trustee doesn't need all of the inheritance to pay the debts, then the surplus amount will be paid to the bankrupt person.

The bankrupt person can't legally waive his inheritance (i.e. decide he doesn't want it), and he can't assign it to someone else (i.e. say that he wants his inheritance paid to his wife or children or friends etc.). The trustee in bankruptcy has complete control over the bankrupt person's incoming money. The executor of the estate has no choice but to send the inheritance cheque to the trustee in bankruptcy. If the bankrupt person has been discharged by the court and later inherits money, he is free to receive it just like anyone else.

"I hired a lawyer for a trial about an estate. The judge ruled against me. Why do I still have to pay my lawyer's bill when he didn't get me what I wanted?"

This is a question that people ask when they are frustrated over the outcome of their case. When you hire a lawyer, you are paying for the services provided, not the desired outcome. No lawyer is able to 100% guarantee that they will win the case, since there are so many factors that need to be considered. The lawyer can't control what the judge decides, what the other lawyer says, or what the decisions are for recent cases - he can only present the best case possible based on the facts.

Regardless of what the judge decides, you hired your lawyer to represent you. This means you are responsible for paying for the time spent working on your file. Logically, if clients do not have to pay their bill when they lose in court, clients should also pay extra when everything goes in their favour. After all, if the price is based on the outcome the rule has to apply to both options.

This kind of situation may be different for other types of law. For example, there are personal injury firms that say they will bill you based on the settlement you receive. In this scenario, the amount you pay is directly related to the outcome of the case. However, this type of arrangement doesn't exist for estates.

At the end of the day, hiring a lawyer for their services is the same as being a customer at any other business. You wouldn't go to a mechanic and assume they'll fix your car for free – why would a lawyer be any different?

Adult Guardianship in Newfoundland and Labrador is Changing

The procedure surrounding adult guardianship in Newfoundland and Labrador is changing. Currently in Newfoundland there are two types of adult guardianship – one for the person, and one for their estate. In order to become someone's guardian, the interested party has to apply for one or both types of guardianship, depending on the situation.

Applying to be the guardian of someone's estate is governed by *The Mentally Disabled Person's Estate Act*, *1990*. This legislation explains what kinds of things a guardian can do.

Applying to be the guardian of a person is a bit different. There isn't any legislation in place to determine what kinds of decisions a guardian can make. At the moment, applications for this kind of guardianship rely on the specifics set out in the *Advance Healthcare Directives Act*, *1995*. However, whether or not a person can be the guardian of another person is at the discretion of the court.

Now, thanks to a recent case from the Newfoundland and Labrador Court of Appeal, this is changing. This case helps determine whether or not the courts have the authority to make this decision, and puts some guidelines for people who are applying to become guardians of a mentally disabled person.

The major result of this case is that the application for guardianship now needs to include more information. Previously, the application briefly explained why the person requires a guardian, who the applicant is, and a bond ensuring that the proposed guardian won't take the person's money and run.

Applications for guardianship now need to address four basic points:

1 – The Need for Assistance

This part of the application explains to the court why the person requires assistance, for both financial and personal matters. This may be due to mental illness, dementia, or any other cause. An affidavit signed by a physician is still required.

The explanation of the person's situation is much more detailed, and includes information about diagnoses.

2 – Notice and a Chance to Respond

Ensuring that the person who needs assistance has been notified of the application and given the opportunity to respond is a massive change.

Applications for guardianship are made by way of petition, which means they are paper applications sent to the judge. In the vast majority of cases, there is no one on the other side of the application, so there is no court appearance.

Giving the person a chance to respond to the application means he or she has a voice in the situation. Any concerns can be aired, and the judge knows the person's opinion.

In cases of dementia, it may be that the person doesn't understand what is going on. This is still important information to give the judge.

3 – Scope of the Guardianship

The goal of guardianship is to give the person as much help as they need without taking away their independence. Previously, a guardian would be able to make any decision for the person that he or she would be able to make for themselves.

With the new guidelines, the types of decisions that a guardian can make are more specific. For example, the application will now include statements like the guardian can pay the person's regular bills, decide whether or not the person needs to live in a care facility, and assist the person in picking up prescriptions.

4 – Choice of Guardian

This guideline means the applicant has to explain to the court why he or she is a good choice to be the person's guardian. Perhaps they already provide the person with care, are the closest relative, or are the most qualified person in the individual's life.

What happens if there is a mistake in a will?

Unfortunately, mistakes happen sometimes. When they happen in a will there can be disastrous consequences. One of the most important things a lawyer needs to do is be specific. What happens when there is a mistake in a will depends on what the mistake is. In wills, mistakes are most often typos due to human error. Keep in mind that a distribution that someone disagrees with is not a mistake.

Incorrect Spelling of a Name

This kind of mistake often creates more confusion than anything else. If the person is also referred to by their relationship to the deceased, this confusion can easily be cleared up. Also, if the name is mentioned multiple times in the will but is misspelled once, it can be reasonably assumed that the same person is being referred to throughout the document.

A bigger issue arises when there are people with very similar names and relationships, and one of them is misspelled. For example, say a will contains gifts to the person's daughters, Jane Smith and Joan Smith. If another clause leaves an item to "my daughter, Jan Smith" there could be a serious issue determining who that gift is meant to be for. It could be that the "e" was left off the end of "Jane", or that the "o" was left out of "Joan".

The executor is not allowed to determine how the assets are distributed. He or she would have to appear before a judge to seek direction about how to proceed.

Donations to Charities that Don't Exist

Accidently putting in an incorrect name for a charity can prevent the intended charity from receiving anything. One way to prevent this is to include the Canada Revenue Agency charitable registration number, but without this additional information an error can be difficult to rectify.

Recently a client brought in a will that left a gift to a church, but the clause referred to a "paris", rather than a "parish". There is no charitable registration number. The only way to clarify who is supposed to receive this donation is to contact the lawyer who wrote the will, and see if he has any notes about who the charity is. If not, the executor is going to have to go to court for direction.

A Missing Decimal

It is very common for an individual to leave sums of money to beneficiaries. However, a missing zero can mean the difference between someone receiving $5000 and $500. In this case there is little recourse for the beneficiary, unless they happen to fall into one of the groups of people who have the legal right to contest a will. It may also be possible to correct the amount if the lawyer has notes about what the testator wanted.

Unfortunately, feeling like everyone else got more does not entitle someone to contest a will. Unless the lawyer who wrote the will can definitively show that the gift was intended to be different, and a judge will rule that the executor can distribute the assets accordingly, the beneficiary cannot change what he or she receives.

One way to help prevent mistakes in wills is to review a draft of the will at home, prior to signing the document. This gives everyone ample time to read through the documents, and to catch any errors.

How Much an Executor Can Charge
if the will doesn't specify a rate

Usually, the amount an executor can charge is specified in the will. Sometimes this a percentage of the estate, a flat rate, or an hourly rate. The executor must follow the amount outlined in the will.

So, what happens if the will doesn't say how much the executor should be paid? If the will says the executor is not to be paid anything, then that is the same as being paid zero dollars and the executor cannot claim anything for payment.

In a situation where the will doesn't say anything about payment one way or another, the executor can claim 1% to 5% of the gross value of the estate (the amount in the estate before any debts are paid). It's up to the executor to choose which percentage along this scale he or she wants to charge.

A general rule of thumb is the more complicated the estate, the more an executor can charge. For example, an estate that has rental properties, and business, international assets, or other complications will be more work. As a result, the executor may want to charge closer to 5%.

For an estate that has a couple bank accounts, a house, and an RRSP, the executor will likely charge closer to 1% of the estate as payment.

Also, the executor does not get to choose a percentage and be paid that amount no matter what. The amount the executor claims is included in the accounting presented to the residual beneficiaries. They must agree to the amount the executor claims.

Practical Tips for Being an Executor

Knowing the duties of being an executor is a great place to start, but there is a lot to keep track of as an estate goes on. Here are a few practical tips to make acting as an executor easier.

Keep every single receipt.

When the time comes for you to account for all your actions as the executor, you will need to be able to show that every dime spent from the estate was for a legitimate estate expense.

Make sure you hold on to every receipt, from realtors to lawyers to the gas bill. You might not need to prove anything, but it's better to have the information and not need it.

Record all the transactions.

Every time money comes into or goes out of the estate, record the transaction in a ledger. Six months or a year down the road you won't be able to remember every little thing, so writing it down as it happens is the best way to keep yourself organized.

Keep track of the amounts, when they came in or went out, and what they were for. As an added bonus, the ledger can be used as your executor's accounting at the end.

Send regular updates.

Nothing sets an estate off on the wrong track like someone thinking someone else is keeping secrets. Prevent any confusion or suspicion by sending regular updates to the beneficiaries.

This can be as simple as an email every other week, or a letter once per month letting everyone know what has happened since the last update.

"Are you ready for a conflict of interest?"

Did you know…?

Everything in our online shop is on sale!

Enter code **spring30** to take 30% off your entire order.

This offer expires April 30, 2019. Regular taxes and shipping fees apply.

There are new resources available on our website!

We'd added some additional items to the Resources page of our website, including:

Transfer of Vehicle Upon Death Application - This document is needed to change the ownership of someone's vehicle after they pass away. It is published by the government of Newfoundland and can be downloaded for free.

Online Quiz – Answer all 10 questions to see how much you know about Canadian estate law. The questions change every few weeks, so check back for new content.

eBooks – Some of Lynne's most popular books are now available for download as e-books. Each book is $9.99, and downloads as a PDF.

Request an Appointment – Simply fill in your name and contact info, and we'll get in touch with you within one business day to schedule an appointment.

Coming Soon:

Form TX19 – Application for Tax Clearance Certificate

Application for Canada Pension Plan Death Benefit

All of the forms we post that are published by government agencies are free to download. These forms can also be downloaded directly from the site that originally published them.

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