Can a Criminal Lawyer ever refuse to take on a Client?

Under Australian law, every person has the right to seek legal representation.

But what if no lawyer wants to take your case?

Are criminal lawyers allowed to refuse, and can they terminate your retainer halfway through?

There are two broad categories of criminal defence lawyers that practice in the courts – solicitors and barristers.

Solicitors are normally the lawyers that you see first.

They will sometimes refer complex or difficult cases to barristers, especially if a case is heading towards a jury trial.

However, there is a common misconception that solicitors are actually less-experienced and less-capable in the courtroom than barristers.

It should be borne in mind that many solicitors have decades of experience in the courtroom and are highly accomplished lawyers who represent clients in court on a daily basis.

By the same token, many barristers are admitted 'to the bar' after finishing law school and 'reading' (ie receiving instructions from another barrister) for just a year, and are extremely inexperienced.

This makes the distinction between 'solicitors' and 'barristers' somewhat artificial – and perhaps it's about time we adopted the American regime of calling all lawyers 'attorneys' – or even just 'lawyers' – and then separating them by their principal area of practice, eg 'criminal trial

attorney' or 'criminal trial lawyer' etc.

In any event, different rules apply to solicitors and barristers when it comes to accepting or refusing a case.

Can a solicitor refuse to accept a case?

In NSW, a solicitor is permitted to refuse to represent someone in a case, and they may do so for a wide range of reasons.

A solicitor is prohibited from taking-on a case where there is a conflict of interest (eg the solicitor has previously represented or given advice to the opposite party), or where they have prior commitments or where the case is beyond their expertise.

If a solicitor breaks those rules, or terminates the case part-way-through without sufficient reason, they may be subject to a complaint on grounds of 'unsatisfactory professional conduct' – and may be subjected to disciplinary action.

Can a barrister refuse to accept a case?

The rules for barristers are stricter.

Barristers often receive cases from solicitors – a process called 'briefing'.

According to the NSW Barrister's Rules a barrister cannot refuse a brief from a solicitor to appear in a court if:

- The case is within their capacity, skill and experience;
- The barrister is available to work, and not already committed to other professional or personal engagements which may prevent the barrister from advancing the clients interests to the best of their ability;
- The fee offered is acceptable
- No other exception applies (for example, there would be

a conflict of interests, it is reasonably likely that the barrister will required in court for another client on the same day or a barrister may be required to cross-examine a friend or family member)

This is known as the cab-rank rule and it means that unpopular clients or causes will still be able to get representation.

It also means that barristers who take on such cases should be spared criticism for doing so.

According to the NSW Law Reform Commission, the latter reason is actually the main implication of the rule.

Can solicitor ever terminate a retainer?

There are some situations where a legal practitioner can stop acting for their client.

And, according to Rule 20 of the NSW Solicitors Rules, a solicitor must in some circumstances refuse to take any further part in defending their client.

For example, if the solicitor learns that their client has:

- Lied in court;
- Submitted a false document;
- Suppressed evidence where there was a positive duty to disclose it; or
- Procured another person to do any of those things

They must advise the client that the court should know about this activity and request authority to inform the court.

If authorisation is not given, a lawyer may no longer defend that client.

In addition, if a defendant confesses their guilt to their lawyer but still wants to plead not guilty, the lawyer may choose to cease acting for that client, provided there is

enough time for another lawyer to take over, and the client does not insist that they continue to act for them.

If they continue to represent the client, they cannot falsely suggest someone else committed the offence, or set up another defence that is inconsistent with the confession.

The lawyer can still ‘put the prosecution to proof’; in other words, make the other side prove their case beyong reasonable doubt.

In practice, however, it is highly advisable for a lawyer to withdraw from a case if they know their client is guilty.

What about Legal Aid?

In criminal trials, you may be refused a grant of legal aid if you don’t meet the Legal Aid Commission’s eligibility criteria.

These criteria include a ‘means test’, which considers your income and assets when determining whether you qualify.

With limited resources, Legal Aid cannot afford to provide funding in all kinds of cases, even if they meet the means test.

Legal Aid must prioritise the cases that they fund and this will include whether your case has a reasonable prospect of success.

This is called the ‘merits test’

They will also consider whether your matter is one that Legal Aid funds, such as whether or not the offence you were charged with carries a prison sentence.

If you have been charged with an offence, it is important to hire an experienced, successful and ethical lawyer.

Although lawyers have stringent regulations on their conduct,

unfortunately not all meet these standards.

It is important to do your research so that you know you can trust your lawyer.