



Insolvency and the incorporated legal practice

By Libby Fulham
Deputy Executive Director
Legal Practice Board

Provisions in legal profession legislation

- Law practice includes an incorporated legal practice.
- An incorporated legal practice must have at least 1 legal practitioner director.
- All other practitioners may be principal in nature, not in practice.
- An insolvent corporation may have administrators or liquidators appointed.
- The Board (regulator) may appoint an external intervener.

General principles

Nature of client files

- Documents
- Electronic records.
- Hard copy documents may belong to client or practice.
- Documents created before retainer are held as agent.
- Need to identify the party for whose benefit the document is prepared (lawyer or client).

General principles

Position of liquidators

- Definitions of 'books' (s 9 Corporations Act).
- Requirement to take possession of 'books' of the Company (s 474 Corporations Act).
- Requirement to take possession of 'books' relevant to the winding up of the Company.
- Requirement to have sufficient funds before incurring expense (s 545 Corporations Act).
- Court ordered direction and disposal of uncollected goods.
- Indemnification for costs of disposal of property.

General principles

Position of External Interveners (Managers)

- Powers set out under legal profession legislation.
- Access to client files and associated documents, and information.
- Position as bailee.
- Return of files.

General principles

Position of practitioners of ILP

- Fundamental ethical obligations.
- Position under legal profession legislation and conduct rules.
- Position as practitioner with designated responsibility for active and archive files.
- Additional responsibility for tax, limitation periods, Will files, assessing any cause of action that may be brought.

Issues

Terms of Retainer

- Terms on:
 - Ownership.
 - Return.
 - Storage.
 - Destruction.

Issues

Ownership of property

- Is the file owned by the client, Company or Managers?
- Dependant on content of file.
- No basis to say manager owns property in file.

Issues

Possession of client files

- Is the file in the possession of the liquidators, Company or Managers?
- Element of control on release of files by liquidators.
- Property of files remains with the liquidators.
- Access to is not equivalent to possession.

Issues

Are files 'books' of Company?

- Client files must contain at least in art property of the Company.
- Documents owned by clients does not abrogate liquidator's responsibility to take possession of and retain client files, or to ensure the 'books' are retained.
- Manager may require 'any other person' who has or has had control of client files to grant access.
- Control over access is not a criticism of liquidator or holding documents belonging to the client.
- Practitioner's responsibility for retention of documents does not abrogate liquidators' responsibility either.

Issues

Are the Managers or Regulator obliged to retain the client files?

- Falsehood in assertion the manager/regulator must comply with conduct rules.
- Copies are not the property of the Company or client.
- In absence of other person obliged to store files, regulator may (through Managers) retain the files.
- Purpose of the legal profession legislation in protecting the interests of the clients.

Issues

Reimbursement for storage costs

- Indemnification for costs from assets of the Company.
- Intermingled documents, may require directions from the Court, as to:
 - Indemnity and lien for costs.
 - Writing to clients seeking retrieval of files or consent to destruction.
 - Advertising for clients to retrieve files.
 - Relief from further storage obligations.
- Instead, liquidators sought reimbursement for storage costs from the Managers.
- No compelling power to make liquidators seek directions.
- Options, to negotiate sharing of storage costs or require practitioners to take possession.

Issues

Responsibility of practitioners

- Obligations under Conduct Rules.
- Ability to enforce such obligations.
- Issues of misconduct for failing to meet professional ethical obligations.



Update on current situation

Issues

Deficiency of legislation

- Obligations rest with the practitioners not the law practice.
- Taking possession of files when not the owner of the files.
- Interstate legal practitioner director.
- Reimbursement for costs of intervention may not be recoverable under provisions in the legal profession legislation.

Pop Quiz

**How many directors can an
incorporated legal practice
have?**

Pop Quiz

**Name one direction a liquidator
can seek from the Court in
relation to documents of the
Company in liquidation?**

Pop Quiz

**Are client files 'books' of the
Company in liquidation?**

Pop Quiz

Is it relevant that a principal practitioner of a law practice may be able to abandon the files of a practice and continue practising under an new practice structure?



Questions