AUCKLAND DISTRICT LAW SOCIETY

Chancery Chambers, 2-8 Chancery Street, Auckland, 1010.
PO Box 58, Auckland, 1140. DX CP24001
Telephone: (09) 303 5270 Facsimile: (09) 309 3726 www.adls.org.nz

PUBLIC ISSUES COMMITTEE

COSTS OF COMPLYING WITH NEW COMPULSORY CLIENT CARE REGIME

This paper is issued by the Public Issues Committee of the Auckland District Law Society. Its views are its own. It cannot and does not necessarily represent the views of all lawyers nor has the subject under discussion necessarily been considered by the Council of the Auckland District Law Society. The paper was accurate at the time of its preparation.

If the Committee is not described by its actual name then it should be described as "a group of Auckland lawyers appointed by the Council of the Auckland District Law Society to consider public issues", and not given too broad an attribution such as "Lawyers say..." or "Lawyers consider...".

The Committee was formed to encourage its members to consider and comment on public issues, for the public benefit, it is hoped, particularly public issues with a legal element. The Committee's standing must stem solely from the quality of the papers it releases and the comments it makes.

If a precis or abstract of this paper is published, or reference made to its content, please advise your readers that the full text of the paper issued by this Committee will be available at the Auckland District Law Society's Internet website:

www.adls.org.nz/profession/comm3/comm38/publicissuespapers/

Public Issues Committee

WHAT ARE THE COSTS TO LAWYERS AND CLIENTS OF COMPLYING WITH NEW COMPULSORY CLIENT CARE REGIME?

Introduction

The lawyer-client relationship is based on mutual obligations. When the relationship is formed, the lawyer agrees to provide legal services in accordance with the client's instructions and the client agrees to pay the lawyer's fees, to instruct the lawyer in a timely fashion and to give the lawyer accurate information.

Under the new client care regime, it will be important to ensure that consumers of legal services fully understand the nature of the solicitor-client relationship before they decide to instruct a lawyer. Lawyers' terms of engagement will be a useful tool for promoting such understanding. The terms should spell out the nature and scope of the services that lawyers will provide to clients and the action that lawyers will take if clients do not fulfil their obligations under the terms of engagement. For this reason, the approach taken by lawyers to the formulation of their terms of engagement is a matter of public importance.

Lawyers' obligations and potential liability under the client care regime

The Lawyers and Conveyancers Act 2006 ("the Act") and the Rules of Conduct and Client Care for Lawyers ("the Rules") will come into effect on 1 August 2008. The new regime is designed to ensure that lawyers take a consumer oriented approach towards their dealings with clients. Under the new consumer focussed regime, a lawyer "must, in advance [i.e. before commencing work on a retainer], provide a client with information in writing on the principal aspects of client service" listed in Rules 3.4 and 3.5 of the Rules and s 94(j) of the Act. That information must advise clients of:

1. The basis on which fees will be charged;
2. The lawyer's indemnity insurance arrangements;
3. The coverage provided by the Lawyers' Fidelity Fund;
4. The lawyer's procedure for handling complaints by clients;
5. The client care and service obligations that lawyers are required to fulfil when providing legal services to their clients;
6. The name/s and status of those who will have general carriage of or overall responsibility for the services provided to the client;
7. Any limitations on the extent of the lawyer's obligations to the client or any limitation or exclusion of the lawyer's liability.

At this point, the cost to clients, who will need to take the time and make the effort to read and understand this information, is unknown. However, what is known is that lawyers who breach the client care regime can be found guilty of misconduct or unsatisfactory conduct.

It is not difficult to determine the circumstances in which lawyers are likely to be found guilty of misconduct. A serious breach of the Act and Rules or any regulations made under the Act [1] will amount to misconduct. Lawyers will be the subject of misconduct complaints if they: (a) commit wilful or reckless breaches of the Act or of any regulations or practice rules made under the Act or any other Act relating to the provision of regulated services; (b) behave in a disgraceful or dishonourable fashion; (c) charge grossly excessive costs for legal work; or (d) wilfully or recklessly fail to comply with any practicing certificate conditions or restrictions (s 7 of the Act).

On the other hand, the ambit of the new concept of unsatisfactory conduct is less clear. What is clear, however, is that the definition of unsatisfactory conduct has been formulated with *the* objective of giving lawyers little margin for error. Unsatisfactory conduct is defined in s 12 of the Act as conduct which: (a) falls short of the standard of competence and diligence that members of the public are entitled to expect of reasonably competent lawyers; (b) would be regarded as unacceptable by lawyers of good standing; (c) does not amount to misconduct but which contravenes the Act, or any regulations or practice rules made under the Act, or of any other Act relating to the provision of regulated services; or (d) does not amount to misconduct but which fails to comply with a condition or restriction to which a practising certificate held by the lawyer is subject.

Number of complaints to the Law Society likely to increase

Any breach of the Act and Rules which is not wilful or reckless appears to be capable of falling within this definition. In *Client Care under the New Regime – How your Practice can benefit*, NZLS 2007, Mackintosh and Webb endorse such a broad interpretation of the term. At pp 11-12 of that work, they write:

> "… the Act does not make allowance for wilful breaches of inconsequential rules - the effect of the breach is irrelevant. Where the breach is not wilful or reckless this will amount to unsatisfactory conduct.
>
> "The concept of client care in fact goes well beyond the concept of negligence or incompetence and encompasses the idea of best practice. While a practitioner who is negligent has committed a legal wrong against his or her client for which a remedy at law may exist, a practitioner who has failed to adhere to the principles of client care may have committed no legal wrong. However, under the Lawyers and Conveyancers Act framework a failure to adhere to the principles of client care is recognised as a professional wrong."

If Mackintosh and Webb are correct, then it is almost inevitable that: (a) from 1 August 2008 onwards the number of complaints to the Law Society about lawyers'

---

[1] Such as the Lawyers and Conveyancers Act (Trust Account) Regulations 2008; Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008; Lawyers and Conveyancers Act (Lawyers: Fidelity Fund) Regulations 2008; Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008.

conduct will increase; [2] and (b) the majority of those complaints will relate to unsatisfactory conduct.

Potential consequences of unsatisfactory conduct complaints

Lawyers will need to be mindful of their potential vulnerability to unsatisfactory conduct complaints for two reasons. First because, the concept of unsatisfactory conduct is new and, in the early stages of the implementation of the new regime, lawyers may not be able to ascertain whether they have complied with their client care responsibilities until *after* their conduct has been scrutinised by the Standards Committee at an unsatisfactory conduct hearing. The second reason is because the Act gives the Standards Committee the power to impose a range of potentially time consuming and costly sanctions on lawyers found guilty of unsatisfactory conduct. Under s 156 of the Act the Standards Committee can:

(a) make an order giving effect to any or all of the terms of an agreed settlement;
(b) make an order censuring or reprimanding a lawyer;
(c) order a lawyer to apologise to a complainant;
(d) order a lawyer to pay compensation of up to $25,000 to anyone suffering loss resulting from the lawyer's acts or omissions; [3] order the reduction, cancellation or refund of a lawyer's fees;
(e) order a lawyer to rectify errors or omissions, or to provide relief from the consequences of errors or omissions;
(f) order a lawyer to pay a fine of up to $15,000;
(g) order an inspection of a lawyer's practice;
(h) order a lawyer to undergo training or education or to take advice on practice management;
(i) order a lawyer to pay the costs and expenses of any inquiry, investigation or hearing conducted by the Standards Committee.

In addition to this, even if a Standards Committee resolves to take no further action against a lawyer, it may still order the lawyer to pay costs where it considers that the proceedings were justified and that it is just to do so (s 157(2)).

How should lawyers respond? - Is it permissible under the new regime to adopt commercially focussed terms of engagement?

Mackintosh and Webb's best way for lawyers to avoid these sanctions will be to "aim for the highest standards of client care". [4] Their statement, as always, is good sense. Lawyers will undoubtedly be able to reduce the possibility of their being the subject of complaints to the Law Society if they adopt a best practice approach to their dealings with clients.

---

[2] In the recent Law Society Seminar *Lawyers and Conveyancers Act – Rules of Conduct and Client Care*, NZLS, 2008, Ian Haynes, one of the architects of the new regime, stated that he expected that the number of complaints would increase after 1 August 2008.

[3] Regulation 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[4] Mackintosh and Webb, *Client Care under the New Regime – How your Practice can benefit*, NZLS 2007, at p 37.

However it is also worth asking, *before* the new regime comes into force, whether the Act and Rules permit lawyers to further reduce the possibility of falling foul of the new regime by taking a commercially focussed (or even a risk averse) approach to their dealings with clients. Such an approach would, of course, have to comply with the requirements of the client care information that lawyers must provide to clients under s 94(j) of the Act and Rules 3.4 and 3.5.

It is suggested that such an approach is permissible in relation to the formulation of lawyers' terms of engagement because it is possible to create terms which: (a) comply with the client care regime; and (b) make it clear to clients that lawyers are in business and that they expect to be paid in a timely fashion for the services which they provide.

Terms which embody this approach would require clients to accept that lawyers have the right to:

- Refuse to accept instructions from a prospective client who:
  - (a) has an unsatisfactory credit history; or
  - (b) refuses to allow a lawyer to obtain information about his/her credit status from a credit agency. [5]
- Insist that the shareholders of a corporate client guarantee to pay the lawyer's fees before the lawyer will accept instructions from, or extend credit to, that client. [6]
- Insist that all disbursements be paid in advance. [7]
- Stop working for the client or terminate the retainer if the client fails to pay the lawyer's fees when they are due. [8]
- Advise a credit agency (and thereby adversely affect the client's credit rating) that the client has failed to pay the lawyer's outstanding fees.
- Take Court action or engage a debt collection agency to collect all outstanding fees. [9]

---

[5] This type of term appears to be permitted by Rule 4.1 which provides: "Good cause to refuse to accept instructions includes … the … inability of the prospective client to pay the normal fee of the lawyer concerned for the relevant work." Clients with poor credit histories would be unlikely to be able to pay their lawyer's normal fees. Lawyers would arguably have good cause to refuse to accept instructions from clients who refuse to allow their credit history to be checked by a credit agency. Do the rules preclude a lawyer from incorporating a term into their terms of engagement which enables them to terminate a retainer if a client refuses to allow a lawyer to check the client's credit history after the lawyer had been engaged by the client?

[6] If such a guarantee is obtained, the guarantor should be required to sign a contract which makes it clear that s/he will be responsible for paying the client's debt if the client defaults.

[7] The booklet that accompanied the recent Law Society Seminar *Lawyers and Conveyancers Act – Rules of Conduct and Client Care*, NZLS, 2008, contains a sample document entitled "Standard terms of engagement". One of those sample terms provides that a law firm "may" ask clients to pay disbursements in advance. However the Act and Rules do not appear to preclude lawyers from protecting their interests by insisting that they be paid in advance.

[8] Such a term is permissible under Rule 4.2.1(b) which provides that "the inability or failure of the client to pay a fee on the agreed basis" constitutes good causes for terminating the retainer.

[9] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that the Standards Committee is not (unless the Standards Committee determines that there are special circumstances that would justify otherwise) to deal with complaints over bills of costs rendered more than two years prior to the complaint or where the fee does not exceed $2,000 (ex GST). Therefore, in the absence of special circumstances, Court proceedings, or the engagement of debt collection agencies, appear to be the only options available for resolving such complaints.

- Add penalty interest to all outstanding fees and charge the client for the costs of collecting those fees.
- Assert a possessory lien over the client's files and documents if the client:
  - (a) has engaged a new solicitor but has not paid the lawyer's fees; or
  - (b) terminates the retainer before paying the lawyer's fees. [10]
- Assert a litigation lien over funds and property recovered through litigation or arbitration proceedings in relation to the costs incurred by the lawyer in obtaining such funds or property. [11]
- Specify:
  - (a) the kinds of documents to which the lawyer and the client will be entitled after termination of the retainer; and
  - (b) what will happen to the documents and records retained by the lawyer after the retainer is terminated. [12]
- Retain copies of a client's documents on termination of retainer if the lawyer has grounds to believe that the client is likely to;
  - (a) complain to the Law Society about the lawyer's conduct; or
  - (b) take legal action against the lawyer. [13]

---

[10] Rules 4.4.1 and 4.4.2 endorse a lawyer's right to assert a possessory lien over a client's documents. However this right is subject to certain limitations. For example Rule 4.4.2 provides that "[i]f the matter in issue is urgent, the former lawyer who holds a lien over documents must make the documents available to the client's new lawyer on receipt of an undertaking from the new lawyer that the former lawyer's fee will be paid in priority to the fee of the new lawyer". Principle 6 Privacy Act 1993 also restricts the efficacy of the possessory lien because it gives clients who are identifiable individuals (including those who have not paid their solicitor's fees) the right to access personal information in their files. Section 42 Privacy Act enables clients to request copies of documents and records containing such information. Such requests must be complied with "not later than 20 working days after the day on which the request is received" (s 40(1) Privacy Act). A failure to comply with Principle 6 is an interference with privacy under s 66 Privacy Act which constitutes grounds for a complaint to the Privacy Commission under s 67. (However, the lawyer can insist that clients, who seek information under Principle 6, pay for the costs of copying and providing such information to them.) Principle 6 does not, however, preclude solicitors from asserting liens oven files and documents that do not contain personal information about an individual. Files and documents which are not affected by Principle 6 include those containing information about body corporates such as companies or incorporated societies. The possessory lien can be effectively asserted over these kinds of documents. For further discussion of these issues see John Edwards "Privacy Act v Solicitor's lien" *LawTalk (682)* Feb 2007:16; Privacy Commissioner case notes 7837 [1997] NZPrivCmr 2 and 16579 [2001] NZPrivCmr 23; and Laws of New Zealand, *Lien*, at para 39.

[11] Sections 333 -335 of the Act and Rules 9.8 - 9.12 do not preclude lawyers from asserting this type of lien. None of the other Rules appear to prevent such a lien from being asserted. However, it may be prudent for lawyers who undertake litigation work for a conditional fee to make it clear to clients that they reserve the right to assert such a lien. For further discussion of this issue see Laws of New Zealand, *Lien*, at para 40.

[12] At paragraph 9 of an opinion on this topic written for the New Zealand Law Society the author suggests that " [a]s a matter of practice, the ownership of and obligations relating to documents should be discussed on establishment of the retainer in order to avoid confusion at a later date": see A Beck opinion *Ownership and Retention of Records on Termination of the Retainer* which is available on the NZLS website at http://www.lawyers.org.nz/PDFs/opinon-abeck.pdf. Under the new regime it would be advisable to ensure that a term relating to retention of documents is incorporated into the terms of engagement.

[13] The lawyer's right to retain copies of the client's documents in these circumstances is endorsed in Rule 4.5 (a) and (b) but it may be prudent to make sure that the client is aware of this right by spelling it out in the terms of engagement.

- Advise the client that any fees estimate is provided by the lawyer on the clear understanding that:
    - (a) it is only an indication of the actual fee that will be charged when the lawyer's work is completed; and
    - (b) that the client will be advised if it appears that the estimate is going to be exceeded; and
    - (c) that the final fee for the work will be based on the lawyer's normal hourly rates. [14]
- Terminate the retainer if the client misleads or deceives the lawyer in a material respect or fails to provide instructions to the lawyer in a timely fashion. [15]
- Give the client clear guidance on the operation of the lawyer's in-house procedures for dealing with client complaints. [16]
- Insist that the client gives written, signed and dated acceptance of the terms of engagement.

Conclusion

The new client care regime is an unknown quantity. No one knows how the public will respond to the new regime. Some clients may consider that Act and Rules give them a licence to bring trivial complaints to the Standards Committee.
However, it is submitted that commercially oriented terms of engagement like those outlined above would facilitate the efficient operation of the client care regime. Such terms would help to minimise the possibility of the client care regime being used as a device for harassing lawyers because they would: (a) enable lawyers and clients to assess at an early stage whether they will be able to form a compatible lawyer-client relationship; and (b) give lawyers the opportunity to deal with and rectify problems (especially problems relating to unpaid fees) before they have become too serious.
This is the first of a series of articles on the cost of complying with the new regime. It is intended and hoped that this article will generate debate on the issues raised in it.

---

[14] Rule 9.4 requires lawyers to provide an estimate of fees if the client requires one – given this fact it may be prudent to include in the terms of engagement an explanation of the limitations and conditions governing such estimate.

[15] Rule 4.2.1(c)-(d) permits lawyers to terminate the retainer in such circumstances.

[16] Such guidance would help to ensure that an in-house complaints resolution system is client-friendly. Clients are more likely to be motivated to bring their complaints to a lawyer who gives them detailed notice in advance of: (i) the way to initiate a complaint; (ii) the person who will be handling the complaint; and (iii) the procedures that will be used to deal with the complaint. Employment agreements usually contain guidance on the procedures for resolving employment disputes. This kind of guidance might be used to good effect under the client care regime.