

Professional Standards: payment of barristers' fees

By Mark Livesey QC, President, South Australian Bar Association

In a recent *Bulletin* article, the Director of Professional Standards outlined a number of important matters about the professional obligation of solicitors to meet the fees of third parties, such as barristers.

The South Australian Bar Association welcomes the attention given by the Law Society, Professional Standards and the *Bulletin* to this important topic. It is an issue which can undermine the easy relationship usually enjoyed between solicitors and barristers. It has the potential to undermine the "cab rank rule" by which solicitors can expect that any counsel with expertise in a matter will accept a brief if available.

Many practitioners recall a time when the obligation of an instructing solicitor to make payment of barristers' fees was stringently observed. There has been a recent and regrettable relaxation in that attitude, notwithstanding the High Court's recent emphasis of the traditional role of counsel in the administration of justice.¹

Because there is no contractual relationship between counsel and client, or indeed between counsel and the instructing solicitor, the instructing solicitor's obligation has been said to be "*one of honour rather than debt*". Whilst there is scope for solicitors to advise third parties in advance if the solicitor is not intending to accept personal liability for payment of a third party's fees,² a barrister may refuse a brief, or return it, where the instructing solicitor does not agree to be responsible for payment of the barrister's fee.³ A barrister may also refuse or return a brief where the barrister has reasonable grounds to doubt that the barrister's fee will be paid reasonably promptly, or in accordance with a costs agreement.⁴

The Bar Association receives questions and complaints from barristers in circumstances where solicitors have failed to make payment of counsel fees, or indeed, where it is believed that a solicitor has received money to pay counsel but then applied those monies for another purpose. Absent an agreement to the contrary, a solicitor's refusal to pay counsel fees can amount to professional misconduct.⁵

Most importantly, it is not, and never has been, acceptable practice for a solicitor to fail to make prompt payment of the fees due

to counsel on the grounds that the client has failed to make payment to the solicitor.

Traditionally, any risk associated with a failure by the client to pay the solicitor has been met by the solicitor ensuring that sufficient fees are received in trust before a brief is delivered, or having been delivered, before work is undertaken by the barrister.

Whilst litigation can move quickly, and sometimes ahead of any arrangements for payment into trust, the obligation of a solicitor to advise a client in advance regarding the client's likely costs exposure should generally ensure that these situations are rare.⁶

The solicitor must ensure that the costs advice given to a client keeps abreast of developments in a matter, for example when the need for an advice about appeal prospects evolves into the need to ensure representation on the appeal. At each stage the solicitor must ensure that any "*agreement in writing*", or any necessary variation to the written retainer, is documented and the cost implications clearly explained to the client.⁷

It is natural and proper for the solicitor to speak with counsel, as with any third party, openly and candidly about the anticipated amount of work required from counsel, the time it might take to undertake that work, as well as the likely cost of the work. Indeed it is hard to imagine how a solicitor can properly advise a client on costs without obtaining some indication about these matters from third parties. When these obligations are met there should be even fewer opportunities for solicitors to be left without funds.

The Bar Association has received occasional complaints about solicitors retaining new counsel without having ensured that previous counsel has been paid. Sometimes these counsel are new to the Bar and uncertain of their rights. It is usually inappropriate to retain new counsel without ensuring that former counsel has been paid. If counsel has reason to believe that previous counsel has not or will not be paid, there may be grounds to refuse or return the brief because:

- it provides a reason to believe that payment will not be made; and
- to accept the brief could promote or assist in a breach of the conduct rules.

From time to time there has been a request made of the Bar Council that it keep a register of those firms or solicitors who habitually fail to promptly pay counsel. Whilst that has not yet been done, it is an issue which the Bar Council is reviewing. The Bar Association will be conducting professional development on the need for caution before counsel adopt any kind of general practice of releasing solicitors from their professional obligation to ensure the prompt payment of counsel fees.

To be clear, solicitors are usually obliged to make prompt payment of counsel fees regardless whether the client has made payment to the solicitor. A brief should generally be refused or returned if it appears that briefing alternative counsel is being used as a mechanism to avoid a solicitor's professional obligation to another member of the Bar.

Whilst there is no impediment to entering into a specific agreement whereby the customary arrangements are varied, it is unwise to do so, except:

- in advance,
- in the clearest terms, and
- in writing.

In the absence of a clear agreement to the contrary, preferably in writing, the Bar Association takes the traditional view that it remains the solicitor's professional responsibility to ensure that counsel is promptly paid, and that a failure to do so amounts to professional misconduct. **B**

Endnotes

¹ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 and *Giannarelli v Wraith* (1998) 165 CLR 543

² Australian Solicitors' Conduct Rules, Conduct Rule 35.1

³ Barristers' Conduct Rules, Rule 99(c)

⁴ Barristers' Conduct Rules, Rule 99(d)

⁵ Dal Pont "*Lawyers' Professional Responsibility in Australia and New Zealand*" LBC 2001, 2nd ed. at 380.

⁶ Australian Solicitors' Conduct Rules, Conduct Rule 16B.2, see also the need for an "*agreement in writing*", *Legal Practitioners Act 1981*, s 42(6) and *McNamara Business & Property Law v Kasperidis* [2005] SAS 269, 92 SASR 382 at [61]-[65] and *McNamara Business & Property Law v Kasperidis* [2007] SAS 90, 97 SASR 129.

⁷ Some counsel, particularly interstate where there is an obligation to give a costs estimate in writing, habitually provide written retainers and costs estimates, together with reviews and variations when necessary. That is not yet an obligation imposed on counsel in South Australia but one which is being considered.