

Cost Agreements: Trust authorities and payment for non-legal services

By Rosalind Burke, Director, Professional Standards, Law Society of SA

As a part of the trust account inspection process, legal practitioners are asked to provide Professional Standards with a copy of their solicitor/client agreement.

Examination of those agreements often reveals the presence of clauses which expose practitioners to the risk of a breach of their professional obligations either under the *Legal Practitioners Act 1981* (LPA), or common law.

The two main areas of concern are trust authorities and the charging of fees for non-legal services.

Trust authorities

Many solicitor/client agreements contain clauses under which the client appears to provide a general authority to the practitioner to transfer trust money from matter to matter and/or to withdraw trust money for the payment of fees and disbursements.

Reliance on such a clause by the practitioner may lead to a breach of the practitioner's fiduciary duty to the client and of section 31 of the LPA because trust money may only be appropriated if the client provides informed consent. This means that prior to any appropriation, the client must have provided consent for a specific amount of money to be withdrawn from trust for a specific purpose, and that the appropriation must be in strict accordance with that consent. A 'general' authority of the type routinely used in solicitor/client agreements does not provide the required informed consent and should not be relied on.

For example, if a client has deposited \$500 into trust and has stated that this is to be used for the purpose of paying a specific disbursement, the money can't be used for any other purpose without the client's further informed consent.

Further, if a client has deposited funds into trust for the payment of a practitioner's unbilled fees, that money can only be

appropriated if a bill in accordance with section 41(1) of the LPA is delivered to the client, or the client has provided specific informed consent to the appropriation of trust money towards those particular fees.

Professional Standards recommends that practitioners refrain from including such general trust authorities in their solicitor/client agreements.

Payment for non-legal services

The "no-profit rule" requires that legal practitioners not profit from their fiduciary relationship with the client except via the receipt of fair and reasonable fees in exchange for competent legal services. In short, legal practitioners have no entitlement to profit out of the provision of non-legal services¹ unless the client has provided prior informed consent².

Many solicitor/client agreements, and practitioner invoices, contain references to fees being payable for the following services:

- File opening.
- Attendances by non-legal staff on administrative matters such as making appointments with a third party for the client, taking telephone messages, arranging conferences, and attendances on the client re billing or trust accounting matters.
- Attendances to handle the client's trust money and record trust account transactions as required.
- Uplifts of disbursements if not paid by the client by a certain date.
- Interest on unpaid legal fees.

The receipt of such fees would constitute a fiduciary breach by the practitioner concerned unless the requisite informed consent of the client had been obtained prior to the fees being charged (but see below for a discussion about the ability to charge fees for attendances on the trust account).

Naturally, practitioners are entitled to seek reimbursement for certain non-legal expenses incurred in the course of the provision of competent legal services, as long as those expenses are fair and reasonable. Such charges made to the client are referred to as disbursements.

Because disbursements are only for the purpose of reimbursing the legal practitioner, the charge made to the client must be for the actual sum incurred by the practitioner. The practitioner cannot ask the client for more than the actual amount incurred as that would lead to the practitioner profiting from the transaction.

So, how to calculate the entitlement to reimbursement? Where the disbursement is related to administrative expenses such as long distance phone calls, faxing, postage, copying, and printing, or third party expenses such as counsel fees and the cost of obtaining expert reports, the actual cost incurred by the practitioner is easy to calculate and apply.

The situation is more difficult when a practitioner wishes to charge for expenses such as file opening fees and interest on unpaid accounts. Setting aside the question of whether charging a sum for file opening is legitimate in any event³, the actual cost to the practitioner of opening files and carrying debt will fluctuate from matter to matter and time to time and will mean that the application of a flat rate might lead to a breach of the no-profit rule.

Further issues arise with respect to charging interest on unpaid accounts and for time spent dealing with trust money.

Many practitioners are of the mistaken view that they can legitimately charge interest on all unpaid accounts at the rate applied in Rule 261 of the *Supreme Court Rules 2006* (interest on judgement debt). However, as that rate will often exceed the actual amount of loss suffered by the practitioner

in carrying the outstanding debt, even if the practitioner has obtained the client's prior informed consent to make such a charge, that practitioner is risking having the charge set aside by the Supreme Court on the grounds that it is not reasonable.

Many practitioners appear to also be of the view that they can automatically charge for the time spent by them in the satisfaction of statutory obligations, such as those relating to trust accounting. This is probably not correct. Even if a client provides prior informed consent, if there is no provision

for the charge in the subject legislation, the making of it is likely to constitute a breach of the practitioner's fiduciary duty and will also be susceptible to being set aside for not being fair or reasonable.

Precedent standard cost agreement

The Society, via its Cost Committee, has developed a precedent standard cost agreement which complies with the current statutory and common law requirements. To receive a copy of the precedent standard cost agreement by email, call Professional Standards on (08) 8229 0229. **B**

Endnotes:

- 1 Non-legal services include services provided by non-lawyers and non-legal work performed by lawyers.
- 2 The client can only give informed consent if there is full disclosure by the fiduciary to the client of all material facts and information that could affect the decision to give the consent. This would involve the practitioner providing to the client a detailed explanation of the basis for the fee and why it is fair and reasonable under the circumstances, and also informing the client that they have a fiduciary right not to be charged that fee unless they provide prior informed consent.
- 3 It is beyond the scope of this paper to discuss the legitimacy of charging for opening a file, but practitioners are urged to seek advice before doing so

Diary Dates

Upcoming CPD and Events

For full details and to register, visit the CPD and Events Calendar at www.lawsocietysa.asn.au or email registrations@lawsocietysa.asn.au.

We invite practitioners to contact the Education Section on 08 8110 5200 or email cpd@lawsocietysa.asn.au with any suggestions for potential CPD topics and speakers.

The 'CPD Units' listed are based on the information available at the time of printing and should be taken as a guide only.

When attending an event practitioners are asked to arrive five minutes prior to the commencement time to register and collect all available materials.

July 2013

Thursday 11 July

9.30am - 12.30pm

CPD Workshop – Family Interview Skills Workshop

2.5 CPD Units

Presenters: Wendy Barry Tindall Gask Bentley Julie Redman Alderman Redman

Friday 19 July, 16 Aug, 13 Sep, 11 Oct – (all 4 days must be attended for CPD credit)

9.00am - 5.00pm

CPD Workshop – Partners and Senior Associates' Leadership Development Programme

28 CPD Units (4-day workshop series)

Presenters: Marie Modra

Marie Modra Consulting

Wednesday 31 July

1.00pm - 2.00pm

CPD Seminar – How to Challenge a Will
1 CPD Unit

Presenters: Michael Magarey Howard

Zelling Chambers Judith Quick Carpenter & Associates

August 2013

Tuesday 6 August

1.00pm - 2.00pm

CPD Seminar – Small Practice Series
1 CPD Unit in Practice Management

Presenters: Peter Rutter Firm Decisions Pty Ltd

Wednesday 7 August

5.30pm - 7.00pm

CPD Seminar – Probate – Tips on How to Avoid Requisitions
1.5 CPD Units

Presenters: Gregory Weldon Andersons

Solicitors Rosemary Caruso

Tindall Gask Bentley

Thursday 8 August

9.00am - 3.00pm

Risk Management Seminar – Fraud Workshops

5 CPD Units in Practice Management, Legal Ethics or Professional Skills

Presenter: Ronwyn North

Streeton Consulting

Friday 9 August

9.00am - 3.00pm

Risk Management Seminar – Fraud Workshops

5 CPD Units in Practice Management, Legal Ethics or Professional Skills

Presenter: Ronwyn North

Streeton Consulting

Thursday 15 August

9.00am - 5.00pm

CPD Conference – Advanced IP Law Conference with IPSANZ

6 CPD Units

Presenters: Ben Fitzpatrick Aickin Chambers
John Simons Minter Ellison Philip Spann IP Australia

Janice Luck University of Melbourne

Wednesday 21 August

5.30pm - 7.00pm

CPD Seminar – Dealing with Incapacity
1.5 CPD Units

Presenters: Gaetano Aiello Treloar & Treloar
Graham Edmonds-Wilson Howard Zelling Chambers Deej Eszenyi Wright Chambers