VCAT | victorian civil & administrative tribunal

16 January 2015

The Hon Michael Black AC QC
Chair, Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000

By email: submissions@legalservicescouncil.org.au

Dear Michael,

Proposed Legal Profession Uniform Rules

Thank you for the opportunity to comment on the draft of the proposed Legal Profession Uniform Rules. They represent a major step forward. I would like to make the following observations.

Proposed Conduct Rules, Proposed Rule 6, Undertakings

Proposed Rule 6.2 requires that solicitors not seek undertakings from other solicitors that would require the co-operation of a third party not party to the undertaking. However there is no corresponding rule that prohibits the *giving* of such an undertaking (compare current Rule 22.2).

Also there does not appear to be anything in the proposed rules that would mirror the operation of the current Rule 27.3, which makes clear that a practitioner is (where not expressly disclaimed) personally bound by the undertakings given by his or her employees.

Proposed Conduct Rules, Proposed Rule 12, Conflict Concerning A Solicitor's Own Interests

Proposed Rule 12.4.3 requires a solicitor who receives a commission from another service provider for client referrals to disclose 'the nature of that commission or benefit'. Should the Proposed Rule explicitly state that this disclosure must include an amount or percentage of any relevant commission?

Proposed Conduct Rules, Proposed Rule 13, Completion or Termination of Engagement

While Proposed Rule 13.3 makes reference to legally aided clients, the Proposed Rules do not seem to contain any provision analogous to the current Rule 39.2(b), which requires solicitors taking instructions to inform the client of their potential eligibility for legal aid (if applicable).

Proposed Conduct Rules, Proposed Rule 41, Conducting a Managed Investment Scheme or Engaging in Mortgage Financing as part of a Law Practice

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Proposed Rule 41 prohibits solicitors from 'conduct[ing] a managed investment scheme or engag[ing] in mortgage financing as part of their law practice, except under a scheme administered by the relevant professional body'. The Proposed Conduct Rules do not define the expression 'relevant professional body', and it is recommended that such a definition be included.

Proposed Uniform General Rules, Part 4.3, Legal Costs

The *Legal Profession Uniform Law (Victoria)*[1] provides a set of statutory defaults for the 'lower threshold' ($750) and 'higher threshold' ($3,000) that govern the appropriate disclosure regime.[2] These can be displaced by rules, and the upper threshold has been set by the Proposed Uniform General Rules at an amount identical to the statutory default. Was it intended that the lower threshold be set by the rules as well?

Proposed Uniform General Rules, Schedule 1, Form 2, Standard Form for Solicitors

(Some of these comments are also applicable to Schedule 1, Form 1, the Standard Disclosure Form for barristers.)

The proposal to use a single page disclosure statement accompanied by an information sheet for costs estimated to fall between $750 and $3,000 is supported. It is most appropriate that the form prominently displays the key information, namely the total amount the client will have to pay, and that it contains a *brief* statement of other applicable rights. This is a great improvement on the current list of information mandated by the present *Legal Profession Act 2004* s 3.4.9.

There are a number of concerns as to the proposed form, and the form and content of the information sheet will be vital to the success of the new regime.

In brief, the issues are:

- There is a multiplicity of concepts in relation to costs which may result in some confusion in practice. Solicitors are required to estimate 'total legal costs', which do 'not include GST and disbursements' (see *LPUL* s 174(9)). They are also required to provide estimates of total legal costs of any other law practice (usually a barrister) that they retain (see *LPUL* s 175). The concept of 'total legal costs' is different from the defined term 'legal costs' (*LPUL* s 6) which *does* include disbursements.
- Form 2 requires the calculation of an 'estimated full amount that you will need to pay', which includes the estimates from *LPUL* ss 174-5, other non-barrister disbursements and GST. This is practical and useful, but the 'full amount that you will need to pay' is not subject to statutory definition, and it is not clear if there is a statutory requirement to record the non-barrister disbursements on the disclosure form.
- The terminology of 'full amount that you will need to pay' may also mislead. In the circumstance where the position is that the client is liable to pay the barrister directly, instead of the solicitor being liable to pay the barrister in the traditional way (see *Dimos v Hanos and Egan* [2001] VSC 174 (Gillard J)) the client will receive two forms, one from the solicitor and one from the barrister. In that situation the expression 'estimated full amount that you will need to pay' may not be appropriate.

[1] See *Legal Profession Uniform Law Application Act 2014* (Vic) s 4, sch. 1 (the *LPUL*).
[2] *LPUL* s 18(4)-(5).

- The client's rights are said in the fifth dot point to include a right to '[r]equest an itemised (detailed) bill (eg timing or work to be done). That dot point needs re-expression. The entitlement to request a detailed bill is repeated.

It would be highly desirable if the form and the information sheet could form the basis of practitioner templates for matters estimated to run over $3,000 – in principle the disclosure obligations above and below this 'upper threshold' are the same, and a goal of the drafters of the information sheet should be to not only meet the mandated requirements of *LPUL* s 174(2) but to assist practitioners to provide effective disclosure in practice.

To that end, it is suggested that consideration be given to the inclusion of worked examples of good and useful disclosure (covering a variety of types of legal work on both small and large retainers) which would allow a client to understand how estimates for a matter were arrived at, and to make an ongoing judgement about how to proceed. Much more detail will be required to explain how a substantial estimate for a major matter is arrived at.

The form does not explicitly provide for a solicitor to disclose an hourly rate where one is used, although the form does include a space to explain how an estimate was arrived at. The rate is such an important part of any explanation of most estimates that its disclosure should be mandated.

Finally, it is noted that there is no proposed rule under s 178(3). It appears that any contravention of the disclosure obligations will result in avoidance of the costs agreement (and hence costs only being recoverable through the Costs Court or VCAT). It would be desirable to give practitioners as much information as possible as to how to satisfy their disclosure obligations (including ongoing disclosure obligations). To have legal force, this will have to be incorporated into the Rules. The status of the Information Sheet(s) needs to be considered carefully. It is undesirable for there to be a lack of clarity on this topic lest the practice arise that that clients ordinarily defend proceedings to recover fees by practitioners with a defence that the costs agreement is void due to improper disclosure. These proceedings may be in the Magistrates' Court and not in VCAT or the Costs Court.

Thank you for this opportunity to consult on the proposed new conduct and general rules. My contact officer is Bryn Davies, Associate to the President's Chambers, VCAT, on (03) 9628 9086 or <bryn.a.davies@supremecourt.vic.gov.au>.

Yours faithfully,

Justice Greg Garde AO RFD
President

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