

Commercial Arrangements Involving Solicitors' use of Location and/or Premises to Obtain Work

The Law Society Council at its meeting on 16 December 2004 resolved to ask the Ethics Committee to consider where it is appropriate for solicitors to practise law and the methods by which solicitors obtain work. This resolution arose from Council's discussion of a particular arrangement involving a solicitor's use of a room in a medical centre.

The Ethics Committee was asked to provide a discussion paper to the Council meeting on 17 March 2005. The following is an amended version of that paper which the Council resolved be published to the profession.

Introduction

The Ethics Committee was required to report to Council on the following issues:

- (a) the physical location of a solicitor's practice; and
- (b) the methods by which solicitors obtain work.

These issues were considered conjunctively, on the understanding that Council was concerned with arrangements between solicitors and third parties which involve the solicitor's use of location and/or particular premises in order to obtain work.

Physical Location of a Solicitor's Practice

In NSW, it appears there is no provision present, or historic, regarding physical location per se of a solicitor's practice. Obviously, solicitors will tend to locate their practices where work is most likely to be found, for example, in a shopping centre or near a Court House. Nor have any broader ethical concerns been raised in regard to mere physical proximity to another service provider, for example, there is no objection to a personal injury solicitor opening an office next door to a doctor's surgery or even, it is submitted, a probate lawyer opening an office next door to a funeral parlour.

Methods by which Solicitors obtain Work

In NSW, the methods by which solicitors obtain work have been the subject of various successive provisions in the *Legal Profession Act, Regulations and Rules* (and prior to July 1994, Council Rulings and Guidelines). These methods include arrangements involving the solicitor conducting another business and/or sharing premises, referral fee arrangements and advertising.

In this paper, the relevant provisions will be examined having regard to arrangements involving solicitors' use of location and/or premises to obtain work.

Historical Provisions

(a) 'Bringing the Profession into Disrepute'

Prior to the commencement of the *Legal Profession Reform Act 1993* on 1 July 1994, there had been various Council Rulings governing solicitors' association with other businesses, pursuant to arrangements which may (or may not) have involved the solicitors conducting the other business and/or sharing premises. Similarly, prior to 1994, various regulations and guidelines governed solicitors' advertising.

All such rulings, regulations and guidelines were generally underlined by the concept of avoiding conduct likely to bring the profession into disrepute. This concept was given statutory force in Regulation 22 *Legal Profession Regulation 1987* which provided:

A solicitor should not directly, or indirectly, do or permit to be done any act or thing in the carrying on of the solicitor's business which -

- (a) brings, or may reasonably be expected to bring, the profession into disrepute;
- or
- (b) is or may reasonably be regarded as being improper conduct.

(i) Solicitors' Carrying on Another Business/Sharing Premises

The 1963 Council Ruling on 'Carrying on Another Business' stated: 'There is no objection to a solicitor carrying on another business of an honourable character which does not derogate from the dignity of the profession' provided that certain safeguards (including avoidance of conflicts) were observed.

At this time, businesses which were apparently considered to derogate from the profession's dignity were those of stock and share broker, money lender, debt collector and mercantile agent. When the Ruling was revised in 1990 the business of real estate agent was added to this list.

Solicitors sharing premises with other service providers were similarly required to ensure that 'the person or company with whom the solicitor proposes to share premises is conducting a business which does not detract from the dignity of the profession'¹.

(ii) Advertising

Restrictions on solicitors' advertising had been gradually relaxed before 1994, Clause 20 *Legal Profession Regulation 1987* allowed a solicitor to advertise in connection with his or her practice and specifically in relation to areas of specialty and costs. However, the clause was stated not to permit:

- (a) advertisements which might reasonably be regarded as being false, misleading or deceptive; or

¹ Former Advertising Guidelines as quoted in College of Law Practice Paper on Professional Responsibility c. 1990. And see discussion at paragraph [5281] Rileys NSW Solicitors Manual (Service 8).

- (b) advertisements that might reasonably be regarded as being offensively vulgar or obscene or sensational; or
- (c) advertisements in which a claim [as to specialty] is made if that claim cannot be substantiated by the solicitor concerned; or
- (d) advertisements that claim the solicitor concerned is able to obtain advantages for clients if the only means by which those advantages could be obtained are improper means; or
- (e) advertising for clients among persons who may have suffered some trauma or injury as a result of a particular event or occurrence if, in the particular circumstances, the form or method of the advertisements is likely to offend or distress that person or other persons who might reasonably be affected; or
- (f) conduct incidental to the advertising of a solicitor's practice if that conduct would be prohibited by clause 22.

After 1994, solicitors were permitted to advertise in any way they saw fit, provided that the advertising was not false, misleading or deceptive. However, with the reintroduction of restrictions on personal injury advertising, the physical placement of advertising was addressed in (the now repealed) Part 7B *Legal Profession Regulation 2002* which prohibited personal injury advertising by way of:

- (a) public exhibition of the statement in or on a hospital,
- (b) display of the statement on any printed document gratuitously sent or delivered to a hospital or left in a hospital or on any vehicle in the vicinity of a hospital. (Cl 68B(5)).

(b) Referral Fees

Historically, arrangements involving payment of referral fees were considered with reference to the impact on the solicitor's fiduciary duty to the referred client. Prior to the introduction of Solicitors Rule 38 (see below) the Ethics Committee's advertising guidelines prohibited referral fees² as evidenced by the Committee's strict view in the following matter:

'The Ethics Committee ... considered a number of letters from solicitors whose client real estate agents had received letters from a firm offering to do some free work for those agents in return for the referral of a set number of conveyancing matters per week. The solicitors had received sales advices from these agents but had not had any prior professional relationship with them.

The Ethics Committee thought sending such letters was objectionable..'³

Current Provisions

The concept of 'bringing the profession into disrepute' was not included in the *Legal Profession Reform Act* amendments, apparently because it was regarded as inconsistent with national competition policy principles. Since 1994, solicitors have been able to employ a range of business structures and to enter into a range of

² Virginia Shirvington 'Obtaining work by offering a reward' *Law Society Journal*, June 1994, p 16.

³ Virginia Shirvington 'Obtaining work by offering a reward' op cit.

business arrangements, subject to the observance of the fiduciary duty and compliance with the Act, Regulations and Rules.

The relevant provisions for present purposes are:

(i) Solicitors' Carrying on Another Business/Sharing Premises

Rule 37 'Conducting another Business' provides:

- 37.1 A practitioner who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the practitioner's legal practice must ensure that the other business is not of such a nature that the practitioner's involvement in it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice, and the practitioner must –
- 37.1.1 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;
 - 37.1.2 disclose to any client of the practitioner, who, in the course of dealing with the practitioner, deals with the other business, the practitioner's financial or other interest in that business; and
 - 37.1.3 cease to act for the client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the practitioner's interest in the other business....
- 37.2 A practitioner will be deemed to be engaged in the conduct of another business where the practitioner, or an associate:
- 37.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;
 - 37.2.2 exercises any material control over the conduct and operation of the business; or
 - 37.2.3 has an entitlement to a share of the income of the business which is substantial, having regard to the total income which is derived from it.

Rule 43 'Sharing of Premises' provides:

If a practitioner conducts the practitioner's practice in circumstances in which the practitioner shares premises, services or other facilities with other legal practitioners or service providers not otherwise associated with the practitioner's practice, the practitioner must maintain clients' files and records securely and separately from those of any other occupants of the shared accommodation.

Rule 38 'Referral Fees' provides:

- 38.1 In the conduct or promotion of a practitioner's practice, the practitioner must not –
- 38.1.1 accept a retainer or instructions to provide legal services to a person, who has been introduced or referred to the practitioner by a third party to whom the practitioner has given or offered to provide a fee, benefit or reward for the referral of clients or potential clients, unless the practitioner has first disclosed to the person referred the practitioner's arrangement with the third party; ...,

It should be noted that at its meeting on 17 March 2005, the Council resolved to recommend that Solicitors Rule 38 be amended by adding at the commencement of the rule the words 'Subject to Rule 10.2.' That Rule provides:

- 10.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

The Council's proposed amendment will confirm the paramountcy of fiduciary duty and the requirement not to act where there is a conflict between the solicitor's own interest and the client's interest.

(ii) Advertising

Solicitors' advertising is now governed by Sections 38J, 38JA and 38K *Legal Profession Act 1987*. Section 38J provides that a solicitor may advertise in any way the solicitor thinks fit as long as the advertisement is not 'false misleading or deceptive' or in contravention of the *Fair Trading Act (NSW)* or the *Trade Practices Act (Clth)*⁴, subject to regulations made under Section 38JA. That section allows for the making of regulations not only in relation to a solicitor's advertising but also in relation to

- (b) advertising by any person for or on behalf of a **barrister** or **solicitor**,
- (c) advertising by any person in connection with the provision of **legal services**,
- (d) advertising by any person of services connected with **personal injury**.

Advertising of personal injury and work injury services is further restricted by clauses 138 to 140D *Legal Profession Regulation 2002* (clauses 74 to 80 *Workers Compensation Regulation 2003*) which effectively prohibit any reference to 'personal injury' or 'work injury' in solicitors' advertising⁵.

It is also relevant to note Rule 38.1 – Taking Advantage of Potential Clients which provides:

- 38.1 In the conduct or promotion of a practitioner's practice, the practitioner must not –...
- 38.1.2 seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the practitioner at the time when the instructions are sought.

⁴ The Council of the Society has issued *Guidelines for Solicitors' Advertising* to assist solicitors to avoid advertising which might be considered 'false misleading or deceptive or in contravention of any the relevant legislation, for the purposes of section 38J or which breach section 38K.

⁵ The strict prohibition on solicitors' advertising of personal injury and work injury services is subject only to the exceptions specified in the Regulations. The main exceptions relate to accredited specialists, legal education and finalised publications.

Application of Current Provisions to Commercial Arrangements involving the use of location and/or premises to obtain work

Any particular arrangement involving a solicitor's use of location and/or premises to obtain work must be considered on its facts, firstly having regard to any possible impact on the solicitor's fiduciary duty to the client⁶.

"The essence of a solicitor's undertaking to act for a client is the solicitor's commitment to serving the client's interest. That undertaking must be discharged with competence, with diligence, in strict confidence and to the exclusion of any other competing interest"⁷.

It will also be relevant to ask:

- (1) does the arrangement involve conducting another business, in which case Rule 37 must be complied with.
- (2) does the arrangement involve a sharing of premises, in which case Rule 43 must be complied with.

Rule 37 and Rule 43 each require observance of confidentiality while Rule 37 also requires full disclosure to the client and avoidance of any conflict between the solicitor's interest and that of client.

A solicitor who hires an office in another service providers' premises would not, without more, be regarded as conducting another business (Cf Rule 37.2). Strictly it may also be doubtful where the occasional hire of an office amounts to a sharing of premises, although clearly the requirements of confidentiality and security would apply in any case.

- (3) Does the arrangement involve establishing a branch office?

Presently⁸, the requirements regarding branch offices (Rule 44) are limited to 'effective control' of the office, including the 'adequate supervision' of staff, and proper representation of the qualifications of those in the office.

A solicitor who merely hires a room in another service providers' premises for the purpose of interviewing clients, would arguably not be regarded as thereby establishing a branch office.

- (4) Does the arrangement involve payment by the solicitor of a referral fee?

This may not always be clear. However, if the payment for a room on premises is clearly in excess of commercial rates, and thus seems referable to the business thereby attracted by the solicitor, it would seem to constitute a referral fee.

⁶ Cf. 'Council's Guidelines for Solicitors Involvement in Commercial Schemes' (2002)

⁷ Rileys 'NSW Solicitors Manual' paragraph [2001] Service 11

⁸ And historically.

Presently, referral fees are permitted with disclosure. The Committee's proposed amendment will clarify the paramountcy of fiduciary duty and the requirement not to act where there is a conflict between the solicitor's own interest and the client's interest.

(5) Does the arrangement involve advertising?

If the solicitor displays or places any advertising material on premises, the solicitor will need to comply with the requirements of the Act and Regulations, and also Solicitors' Rule 38 (the latter seeming particularly relevant in relation to solicitors' hiring rooms in medical centres).

Conclusion

In the Ethics Committee's view, the current requirements, being observance of the fiduciary duty and compliance with the relevant provisions of the Act, Regulations and Rules are adequate to regulate commercial arrangements involving solicitors' use of location and/or premises to obtain work.

Each arrangement must be considered on its facts and concerns arising from any particular arrangement may need to be addressed in the context of a complaint.