Current Issues at the LPCC

Legal Profession Complaints Committee

USE OF THE TERMS 'SPECIALIST' AND 'EXPERT' IN ADVERTISEMENTS

The Committee has become aware that practitioners and law practices are making increasing use of the terms 'specialist' and 'expert' in their advertising, marketing and promotion. Whether a practitioner can refer to himself or herself as a 'specialist' or 'expert' will depend on whether the use of those terms would convey a false or misleading impression: rule 45 *Legal Profession Conduct Rules 2010*.

The Committee has now published Guidelines entitled *"Use of the terms 'specialist' and 'expert' in advertisements"* in the Complaints area on the Legal Practice Board's website (www.lpbwa.org.au). The Guidelines set out in detail the approach the Committee will take to complaints and conduct investigations concerning advertisements in which practitioners make claims to being a 'specialist' or an 'expert'. This article provides only a brief summary of the approach the Committee will take.

The Committee is of the view that the term 'specialist' may be understood by members of the public as implying expertise rather than merely conveying a preferred area of practice. In considering whether or not a claim to be a 'specialist' would breach rule 45(1), the Committee in most cases will take into account the same criteria used by the law societies in Australia to consider eligibility into a specialist accreditation program. That criteria is based on years in practice and demonstrated substantial involvement in the 'specialist' area.

Where a law practice promotes itself as a 'specialist' practice in a particular area of law, the Committee expects that the practice's work in that area would constitute at least 25% of its total work and that each of the principals of the practice who supervise the work of the employed practitioners in that area would themselves be 'specialists'.

The Committee is of the view that the term 'expert' may be understood by members of the public as implying that a practitioner has particular knowledge, skill, training or experience in an area of law above that of other practitioners, even accredited specialists. The Committee considers that the term 'expert' should only be used in limited circumstances where a clear claim to expertise can properly and reasonably be made, having regard to the particular qualifications, experience and continuous involvement and professional development of a practitioner in a particular field of practice.

In considering whether a claim to be an 'expert' may convey a false or misleading impression, the Committee in most cases will take into consideration the same criteria as used for the use of the term 'specialist' and/or similar criteria used by a court to satisfy itself that a witness is a qualified expert such as whether the practitioner has some particular knowledge, skill, training or experience in that area of law and would properly and reasonably be accepted by his or her peers as being an expert in that area of law.

If a law practice promotes itself as offering 'expert' advice or being 'experts' in a particular area of law, the Committee expects that the actual work in that area would be undertaken substantially by practitioners who would themselves be properly and reasonably considered to be 'experts' in that area.

Practitioners are urged to make themselves familiar with the Guidelines and, if necessary, make changes to their advertisements, marketing and promotional material.

In order to give practitioners time to review their operations for compliance with the Guidelines (including advertisements, marketing and promotional material) and make any necessary changes, the Committee will not be applying the specific criteria set out in the Guidelines for a period of 3 months ending 31 August 2014.

CASH WITHDRAWALS FROM TRUST

There have been some occasions recently when trust funds have been withdrawn from practices' trust bank accounts in cash.

Section 217(1) of the *Legal Profession Act 2008* provides that a law practice must not withdraw trust money from a general trust account otherwise than by cheque or electronic funds transfer. The maximum penalty for breaching this section is a fine of $10,000.

There is no exception to s217(1). Even if a client signs a direction authorising a cash withdrawal from a practice's general trust bank account, it is still not permissible to withdraw the funds in cash: s217(4).

The majority of cash withdrawals occur as a result of clients wanting urgent access to settlement funds. If a client seeks urgent access to settlement funds received into a practice's general trust bank account, the following options may be considered and appropriate instructions sought from the client:

- If the settlement funds are paid by cheque, request a 'special answer' on the cheque which means that the practice will be notified earlier than normal whether the funds have been cleared so that they can be drawn upon. A fee is payable for a special answer.
- Arrange to transfer the funds to the client by electronic funds transfer direct to the client's bank account.

The combined effect of these options will generally mean there is only a minimal delay of about 2 to 4 business days before the client can access his or her funds.

Practices should be aware that some banks include a notation on trust bank statements of 'cash withdrawal' when a practice requests a bank cheque. Any practice which has a trust bank statement with such a notation will need to have available for its auditor or the trust account inspector documentation to show that a bank cheque was requested and no cash withdrawal was made.