Cessation of Practice (Circular 24/95)

by Michael Sandor

As there is no space for fully setting out the circular the following comments have to be read as annotations to it, with the reader having the circular to hand. The comments are entirely the responsibility of the writer who was one of the members of the committee that drafted the circular. References to the 'Draft Guide' are references to the final draft of the Hong Kong Solicitors' Guide to Professional Conduct.

The circular took effect on 23 January 1995. It contains 'directions (which) should be considered by members on the cessation of their practice'. It contains directives and guidance which indicate the breaches which automatically amount to misconduct (must do's) and others that could amount to misconduct (should do's). The objective is to positively assist members to carefully manage the cessation.

Definition of 'Cessation': This is straightforward and the circular thus covers cessations due to: (a) retirement of a sole practitioner; (b) closure by a partnership; (c) retirement of a partner; (d) amalgamation; and (e) division of the firm. Whether a firm is dissolved by retirement of a partner will depend upon the terms of the partnership agreement and the law. Death of a practitioner is not covered.

Notification requirements

a. *To the Society* (para 1): the member should notify by completing the form at least 14 days prior to cessation. This is a *minimum* for the notification to the Society. It does *not* set the standard for informing clients and others. The Society also should be informed of the identity of the *agent* appointed to deal with consequential matters; that is, if there is no successor firm (see para 15 and item 4 of the *Cessation of Practice Form).*

b. *To the Indemnity Fund Managers* (para 2): notice of cessation *must* be given at the same time as to the Society.

c. *To Clients* (para 3). This and para 4 are crucial. If clients are not given 'sufficient notice' of the planned cessation and their interests are thereby 'prejudiced' this will be a matter for discipline ('You *must* give sufficient notice'), as well as opening the door to a negligence action (successor firms please note). Clients or prospective clients ought to be told of the prospective cessation if their matter is likely to continue beyond the planned date of cessation. If it is a litigation matter a warning will be essential unless cessation is by amalgamation. Generally, one ought to refuse instructions for litigation if cessation is planned.

d. *To third parties* (para 4). It is vital to give early warning of cessation to persons or organisations other than clients involved in transactions with your firm. They *must* be informed in 'sufficient time' to do what needs to be done before cessation. It is better that the Land Registry and Probate Registry be informed before cessation. The Guidance Committee understands that the Hong Kong practice is for the new firm to inform the Probate Registry that it has taken over a matter from another firm and for the Registrar (sometimes? often?) to request confirmation from the previous firm; this could slow down the process of administration considerably. One way to smooth the transition is for the 'ceasing' firm to forewarn the Registry and copy the letter on the file passed to the successor firm.

Preservation of files. Paragraph 7 refers to Circular 313/93 'Destruction of Old Files', which

gives *guidelines* (not rules) for preserving files. Thus conveyancing files are required to be kept for 15 years *minimum*, tenancy files for seven years, other files seven years and 'exceptionally' files on *criminal* cases need be kept for only three years after the appeal period has expired. There is detailed advice in the 'English' Guide ('EPC' 6th Edition) Annexes 12B & C. Also the *Limitation Ordinance* should be kept in mind. In the light of a solicitor's special liability for negligence to disappointed beneficiaries of a will, the law and the *Limitation Ordinance* should be kept clearly in mind when storing a testamentary file. Also undertakings are not subject to Limitation of Action (*Bray v Stuart A West & Co* [1989] NLJR 753) so that files with undischarged undertakings recorded on them should be carefully stored.

Outstanding professional fees and undertakings (para 9). Cessation does not cancel the sole solicitor's personal obligation and dissolving partners' obligations to pay outstanding barristers' fees (Draft Guide para 12.04 (3)), or the fees of other persons instructed on behalf of a client (Draft Guide para 4.13). Such persons include forensic accountants, enquiry agents, expert witnesses and ordinary witnesses.

The solicitor who has ceased practice remains bound to honour his undertakings given in practice and is required to honour them so long as his name remains on the roll (Draft Guide para 14.02(2)). He cannot assign the burden of an undertaking without the express approval of the recipient (see Draft Guide para 14.03(3)). Where there is a successor firm, that firm is not liable on the undertaking unless it accepts liability by expressly or impliedly adopting the undertaking. If the successor does adopt the undertaking, the ceasing solicitor nevertheless remains liable until he expressly obtains a release from the recipient (see Draft Guide, para 14.03(4).

Money in Client Account (para 10). If there is to be *no* successor firm (para 10(a)), there ought to be some effort to prepare for the statutory requirement to return client moneys. A review of accounts and files should indicate the clients who have not been seen or contacted for sometime. If there is early warning of difficulties in tracing them, then the

ceasing solicitor could take steps to advertise and then if unsuccessful, ask for directions from the Law Society (section 8(2) of the Solicitors' Accounts Rules) which could excuse the breach. A qualified person or a firm of solicitors *must* be appointed to deal with 'consequential matters' (para 15), but effective early action by the ceasing solicitor would ease their burden and expenses.

If there is a successor firm then para 10(b) requires that, 'Unless your client instructs you to the contrary, the funds in your client account should be transferred to the client account of the new firm ... All clients should be notified of the transfer ...'. The words 'Unless your client instructs you to the contrary', assume that the ceasing solicitor has given sufficient notice of cessation (para 3) so that the client has the opportunity to exercise his fundamental freedom 'to instruct a solicitor of his choice;'(Rule 2(b), Solicitors' Practice Rules). Understandably, a partnership that is about to split amicably or a firm that is hoping to maximise its sale price to a successor will not be enthusiastic about informing clients that they are free to transfer allegiance to some other firm or to the successor firm. But it is essential that the solicitor honours the fundamental principle described by Practice Rule 2(b). The Commentaries 6, 7, 8 and 9 to Principle 5.22 of the Draft Guide require this.

The Guidance Committee recently had to deal with a dispute about the division of moneys 'left over' in the client account after a partnership 'dissolved' into two firms. What was extraordinary about the case was that it appeared that the clients were simply 'divided up' and allocated in accordance with the ex-partners' agreed formula and none of the partners informed the clients of their freedom to leave or continue with the 'new' firms. All partners therefore prima facie committed statutory misconduct.

The Retainer – 'Entire Contract' (para 12). The entire contract rule applies to a solicitor's retainer. Its effect in Hong Kong is to prevent a solicitor from claiming for his profit costs until the task is completed. However, the solicitor may obtain agreement from a client to interim billing at the beginning of the retainer (Draft Guide, para 4.08(2)).

In every retainer a solicitor impliedly promises to complete the task. Hence the law requires good cause and reasonable notice if a lawyer intends to terminate before completion. In one sense, prospective retirement is 'good cause', ie it would not be a breach of contract(?) and therefore 'reasonable notice' should be given if the solicitor intends to bill for work done for an uncompleted task. A solicitor who well knew that a task was 'at risk' because of a planned cessation of practice (retirement of a sole practitioner, dissolution of a partnership and no successor) could be held to have been in breach or to have been negligent by terminating the retainer without reasonable notice.

Para 12 of the Cessation Circular advises the ceasing solicitor 'to ensure that the client is not left unrepresented'. If litigation is in hand and unlikely to be completed by the date of cessation, clients should be informed as early as possible so that they may elect to go to another firm without the prejudice of delay (I mean that a solicitor's familiarity with the cause and the case is often as crucial as the legal substance of the action). If the cessation does not result in the 'loss' of that solicitor to a representative because the client elects to continue to retain him or her in the successor firm then the problem disappears. Also, there is an obligation to inform the court of the withdrawal or of a change of representation (see Order 67, Rules 1 & 5, *Supreme Court Rules*).

Papers to be handed over on termination of retainer (para 13). 'All documents and materials belonging to a client should, subject to any lien, be returned to him or disposed of according to his directions'. There is guidance in the EPC, Annexes 12B & C as to what are client-owned and what are solicitor-owned papers and materials. Circular 313/93 directs members to the English Guide for this information.

Miscellaneous. Paragraph 16 is clear and ought to be an established practice. However, one firm was recently reported to the Guidance Committee when it, as an agent for a dissolved and de-registered firm, sent out inquiries on behalf of the non-existent firm under that firm's letterhead! It was a confusing and misleading way of dealing with the task and, furthermore, the failure to destroy the stationery could have led to fraud by someone who came into possession of it. ❖