

Professional Indemnity

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Customer Due Diligence And Record Keeping

Customer due diligence as well as record keeping have become increasingly important with the government's emphasis on robust controls, strict supervision and enforcement to combat money laundering and terrorist financing.

Law Practices and practitioners should already be familiar with their obligations in this respect which require them to:

- identify and know their clients;
- maintain records; and
- report suspicious transactions

These obligations were set out in The Legal Profession (Professional Conduct) Rules (the Conduct Rules) and the Law Society's Practice Direction 1 of 2008. Effective 23 May 2015, the obligations under the Conduct Rules (Rules 11G to 11I) have been incorporated into the new Part VA of the Legal Profession Act (the Act). This Part of the Act deals with the measures which a lawyer or law practice should take in order to prevent money laundering and the financing of terrorism. Sections 70C and 70E respectively deal with client due diligence and maintaining of records with respect to relevant matters. Section 70D provides for the reporting of suspicious transactions.

A "relevant matter" is defined as any of the following:

- a) acquisition, divestment or any other dealing of any interest in real estate;
- b) management of client's moneys, securities or other assets, or of bank, savings or securities accounts;
- c) creation, operation or management of any company, corporation, partnership, society, trust or other legal entity or legal arrangement;
- d) acquisition, merger, sale or disposal of any company, corporation, partnership, sole proprietorship, business trust or other business entity;
- e) any matter, in which a legal practitioner or law practice acts for a client, that is unusual in the ordinary

course of business, having regard to:

- (i) the complexity of the matter;
- (ii) the quantum involved;
- (iii) any apparent economic or lawful purpose of the matter; and
- (iv) the business and risk profile of the client.

The Legal Profession (Prevention of Money Laundering And Financing Of Terrorism) Rules 2015 (the Rules) prescribe customer due diligence measures. Part 2 of the Rules identifies six types of customer due diligence measures depending on who the client is. In respect of any client, if you suspect that the client may be involved in money laundering or financing of terrorism, you are expressly prohibited from the creation of any new business relationship with that client, or the undertaking of any new matter (Rule 5). In addition, you are obliged to disclose the suspicion or the information based on which the suspicion has arisen.

General customer due diligence in relation to an individual client involves the identification of the client and verification of the identity. In addition, you have to determine whether the client is politically-exposed etc. If the client happens to be an entity or legal arrangement, identity and verification of the identity must be obtained through *inter alia*, the name of the client, its form, documents such as memorandum and articles of association, and individuals in the senior management.

Further with regard to an entity or legal arrangement, you must identify the beneficial owners and their identity, and the understanding of the client's ownership and structure as well as the nature of its business.

In situations where an individual purports to act on behalf of a client, verification of the individual's authority to represent the client, and verification of the identity of the individual are necessary.

Rule 9 deals with customer due diligence measures in relation to business relationships. Essentially, information must be obtained on the purpose and intended nature of the business relationship. There is an obligation to conduct customer due diligence measures throughout such relationship, which includes scrutiny of the transactions undertaken.

If you act as a trustee, you must perform specific due diligence measures prescribed in Rule 10. Trustees of an express trust must obtain and maintain adequate, accurate and current information on the identities of *inter alia* the settlor, each trustee, and each beneficiary. Trustees of a trust governed by Singapore law are required to obtain and maintain basic information on every other regulated agent of, or service provider, to the trust, including investment adviser or manager, accountant or tax adviser.

In addition to performing the customer

due diligence measures, you must also keep and maintain records of each relevant matter in which you acted, for a period of 5 years after completion of the relevant matter.

Practitioners and Law Practices must

take note that contravention of Part VA of the Act subjects them to disciplinary proceedings, and regulatory actions respectively. Therefore, read and get yourselves familiar with the provisions of Part VA and also the Rules, and ensure compliance. ■

Letter of Engagement and Warrant to Act: You Cannot Do Without Them

Letter of Engagement

Before undertaking any work for a client, ensure that you have a Letter of Engagement executed by the client. A proper Engagement Letter is a useful risk management tool. It will help avoid or minimise the risk of negligence claims, and also complaints of inadequate professional services.

A proper Letter of Engagement must identify the client, and set out the subject matter for which you are engaged, and who in your Law Practice will handle the matter. You should clearly define your scope of services including the following:

- the key steps in the matter
- any action or steps to be taken by the client (e.g. information or documents to be provided), and also the obligation to keep you informed (e.g. change of address and other contact details), co-operate and be truthful
- the need for any documents or reports from third parties (e.g. medical reports), and whether you or the client will obtain the same
- the expected time required to complete the legal services and achieve the results
- any limits to the representation such as tasks that cannot be performed under the law
- the results that you are likely to achieve, but take care not to guarantee a particular result

When you are instructed to represent multiple clients, any potential conflict of interest that you may perceive must be disclosed to the clients. In addition, you must advise them of their right to seek independent representation. Should the clients agree to engage you

with full knowledge of the conflict of interest, do state the consequences of the conflict arising and the likelihood of your withdrawal and resulting increase in expenses and delay. However, if you recognize that there are some conflicts which can make it difficult for you to represent all parties concerned fairly, decline representation altogether.

When representing multiple clients, it is also important for you to identify the party on whose instructions you have to act. You need to ensure that this is agreed by the other clients. In addition, you must state in the Engagement Letter that any information obtained by or from any source will be shared with all of them.

Do not forget to mention your fee arrangement. Clients often sue lawyers for negligence when they are pressed for payment of legal fees. Therefore, you must clearly state the basis upon which you will charge for your services. Give an estimate, and also state whether a deposit is required, and whether interim bills will be rendered. Do also explain any other charges or disbursements the client has to bear, and if so, whether the client has to pay for these first before you proceed to do the needful or you would fund first and seek reimbursement later. Remember to explain the consequences of their failure to pay your deposit, interim bills and other charges and disbursements (e.g. withdrawal from the matter).

As provided in the Legal Profession (Professional Conduct) Rules, ensure that your Letter of Engagement details how you will communicate with your client (e.g. telephone, e-mail, mail, facsimile). You must copy them on all pertinent correspondence, and report the progress of the matter on

a regular basis. Let the client know of your response time to their telephone calls, e-mails, letters etc (e.g. within one working day if urgent, and for non-urgent matters within three days).

In addition, your Engagement Letter must set out the circumstances in which you may withdraw from representing the client (e.g. non-payment of your fees as stipulated in the Engagement Letter, non co-operation by the client). It is also advisable to stipulate your charges should you be asked to transfer the matter to another lawyer.

Finally, remember your statutory duties relating to client due diligence and record keeping under Part VA of the Legal Profession Act, and highlight these in your Engagement Letter so that your client knows at the very outset that he has to provide the requisite information and documents to you.

Warrant to Act

Order 64 Rule 7(1) of the Rules of Court (“ROC”) makes it mandatory for every lawyer representing any party in any cause or matter to obtain a Warrant to Act from that party. Pursuant to Order 64 Rule 7(2) of the ROC, absence of a Warrant to Act can be taken as prima facie evidence of a lawyer’s lack of authority to act. In this regard, it is worth noting the following observations of the High Court in *Tung Hui Mannequin Industries v Tenet Insurance Co Ltd & Ors* [2005] 3 SLR 184 concerning a lawyer’s authority to pursue legal proceedings on behalf of his client:-

- (a) With regard to the contents of the Warrant to Act, it should be limited to the words of authority and should not contain other communications between a lawyer and his client which may be privileged [at para 45]; and
- (b) If a lawyer receives a request to disclose his Warrant to Act and is unable to establish his authority to act, his client’s action may be struck out [at para 48].

As can be seen from the above, it is important for you to obtain a Warrant to Act from your client right from the outset. It is in fact preferable to get your client to execute both the Letter of Engagement and the Warrant to Act at the same time before undertaking any work for your client. ■