

Certifying documents

I remind lawyers that, when certifying a document for the purposes of the Anti-Money Laundering and Countering of Terrorism Act 2009, a lawyer must include the date of the certification.

JOHN MCLEAN
Rabobank

AML regime

I refer to *LawTalk* Issue 825, published on 16 August 2013.

On page 12 of that issue there is a small item under the heading *Regulator confirms lawyers' exemption "narrow"*. This is immediately below an article on the Anti-Money Laundering (AML) Regime. The brief item also refers to the AML regime and its possible application to lawyers, and makes reference to an article in the *NZ Herald* on 20 July 2013. This appears to be in support of the primary article on that page exhorting lawyers to start addressing the potential application of the new AML regime now, rather than waiting to see what specific rules might apply to lawyers in the future.

If you read the *Herald* article you will see that it concerns the regulatory position for lawyers under the Financial Advisors Act 2008, not the AML legislation – it has nothing to do with AML compliance issues. Similarly your brief article refers to the Financial Market Authority as the AML Regulator, whereas the AML Regulator who might be responsible for lawyers in the future is the Department of Internal Affairs.

In my opinion there have been a number of articles written on this topic which overstate the current potential compliance obligations for lawyers.

JOHN HART
Barrister, Auckland

Acting without specific instructions

The implications of the standards committee decision reported under the heading "Fined for paying out more than specifically authorised" and published in the 19 July 2013 edition of *LawTalk* are of concern.

To reiterate the facts, lawyer C was instructed to act on a property sale that required the discharge of a mortgage. Client thought that the amount secured by the mortgage was "about \$90,000".

The sale process seemed to be proceeding

in a less than friendly manner since the buyers had made it clear that if settlement was late they were going to charge penalties.

The bank settlement statement was received less than an hour before the settlement deadline. The amount demanded was considerably more than the sum mentioned by the client as secured.

The amount required by the bank to discharge the mortgage was raised with the bank, which advised that an employee had spoken with the client, who was "happy about it". Client subsequently denied the conversation with the bank.

Lawyer C could not contact the client, and opted to settle. This was found to be unsatisfactory conduct, and the lawyer was fined.

The obligation imposed by s110 of the Lawyers and Conveyancers Act 2006 is to hold client's money in a trust account "exclusively for that person, to be paid to that person or as that person directs".

Here the client had directed the lawyer to pay a sum uncertain to the bank to allow her sale to proceed.

Property lawyers will know that a client's estimate of the amount owing on a mortgage is about as reliable as their view of the title they hold in the land. Nevertheless the standards committee appears to have been happy to describe what went on in the terms "client's instructions were to discharge a mortgage over the property of about \$90,000". For myself, I doubt that any such instruction was given. In acting on a sale, I have never been given specific instructions to discharge the mortgage, it is a necessary implication of the retainer to act on the sale. That to one side, the client clearly expected that the amount to be paid to the bank would be "about \$90,000".

From now on, property lawyers will be required to know precisely what "about \$90,000" means. Overestimate at your peril.

Then there is the more worrying aspect about the client's instructions, or alleged instructions, being passed on by a third party.

From now on we will not be able to take the word of a bank, and if we cannot accept a statement about the client's instructions from a bank, we cannot accept it from anyone. The instruction, apparently, must come direct from the lips of the client.

So the next case that goes to the standards committee involves much the same facts,

let us say that the client is in the taxi on the way to the airport and the bank phones the client and says "you need to pay \$180,000 to discharge the mortgage, that okay?" Client says "yes", turns off her phone and jumps on the plane. Bank officer phones you, for indeed it is you in front of the standards committee, and relates the conversation to you. You are obliged to respond "it is not that I do not believe you O Honourable Banker, it is that the standards committee has said that I cannot rely upon what you say, I must hear it direct from the sacred lips of the client". So you do not settle, purchaser's family spend the night in a bus shelter, there are pictures on the front page of every newspaper in the country next day of their weeping and shivering, and client is charged penalties. Your name is mud, all lawyers are reviled.

Who gets to suck the mop I hear you say, and the answer is, my friend, you do.

In the reported case we are told that the lawyer could not rely upon the client's instruction being relayed by a banker. A relative, son, daughter, spouse must be regarded in the same way. You are only entitled to receive instructions direct from the client.

If somebody calls you on the phone, or even if you dial the phone number given you by the client, do you know that the person speaking is indeed the client?

Nowadays most of my clients communicate with me by email, and not a few by text message. Viewed objectively, I do not know who sent an email or text message to me. Can there be any distinction between receiving a purported instruction via the word of a bank officer, who we know is a real person and one normally regarded as completely trustworthy, and an electronic message which could have been sent by anyone with access to either the client's electronic identity or the device? If there is, I cannot see it. So you cannot accept an instruction involving the payment of trust monies by email or text, and unless you have arranged a set of security questions with the client, you face the risk of denial if you accept telephone instructions. You face the risk of denial anyway since you cannot record the conversation without the consent of the other party.

Will a cunningly worded Letter of Engagement save you? It may be worth a try, but