CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Date: 29 June 2010
Location: 4 Coleman Street, London EC2

Present:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Gavin Foggo	Fox Williams LLP
Tim Hardy	CMS Cameron McKenna LLP
Hardeep Nahal	Herbert Smith LLP
Julie Herriott (for Stefan Paciorek)	Pinsent Masons LLP
Joanna Page	Allen & Overy LLP
Kevin Perry	Edwards Angell Palmer & Dodge UK LLP

In attendance: Lizzie Alpass (for Helen Jackson), Associate Observer, CMS Cameron McKenna LLP

Apologies: Tom Coates, Richard Foss, Willy Manners, Rory McAlpine, Arundel McDougall, Patrick Swain, Philip Vaughan

1. The Minutes of the previous meeting, held on 27 April 2010, were approved.

2. Matters arising from those Minutes:

   (a) Paragraph 3(c) (amendments to the rules for service in the Civil Procedure (Amendment No 2) Rules 2009): The Society had received a letter dated 4 May 2010 from the Assistant Private Secretary to the Master of the Rolls apologising that he was not yet in a position to send a substantive response to the Committee's letter of 11 February 2010, and promising to contact the Committee further as soon as he heard anything.

   (b) Paragraph 9(f) (guideline hourly rates): The Judicial Communications Office had issued a press release dated 25 June 2010 saying that the Master of the Rolls had accepted the recommendations of the Advisory Committee on Civil Costs. The rates adopted on an interim basis in March 2010, with effect from 1 April 2010, therefore became final.

Higher rights of audience

3. Leading on from the discussion at the last meeting (paragraphs 6 and 7 of the Minutes), the Committee noted the SRA's Handbook for assessment providers, including that 60% of the marks on assessment were to be for generic or specific advocacy (page 11) and the inclusion in the advocacy standards of matters that had nothing to do with advocacy (eg apply pre-action protocols), a point the Committee had made previously.

4. The Committee felt that there should be a level playing field between solicitors and barristers as far as rights of audience are concerned. It also noted that the College of Law's fees of over £2000, in addition to the lost fee-earning time, for advocacy courses and assessments, could discourage, in particular, smaller firms from allowing their lawyers to obtain higher rights. The Committee agreed to send a short letter to the SRA expressing its concerns.

EU bank attachment orders

5. The Committee noted the questionnaire put out by those conducting the impact assessment for the European Commission in relation to the Commission's proposal to allow pre-judgment orders to be made in one member state attaching bank accounts in another member state. The time for returning the questionnaire had recently passed, but any firms or their clients interested should still be encouraged to complete and return the questionnaire.

Mayor's and City Court

6. The Committee considered the proposal by the Ministry of Justice to close the Mayor's and City Court and to transfer its work to the Central London County Court and the Clerkenwell and Shoreditch County Court. The Chairman said that the Society had been informed that there was to be a meeting of court users on 8 July 2010 at 4.30pm.

7. The members of the Committee did not have significant experience of using the Mayor's and City Court, but did not oppose the proposal to close it in principle, provided that adequate arrangements were made at these other County Courts to handle the increased business. The administrative arrangements at the Central London County Court in particular had, historically, been poor.

Bar Council consultation on contractual terms of work for barristers

8. The Bar Council had issued a consultation paper dated April 2010 on contractual terms of work for barristers. The paper argued that the honorarium basis on which barristers are generally paid was "an anachronism and has long been obsolete". It proposed that barristers should be instructed on a contractual basis, and included at Annexe 4 proposed terms of business for barristers, which, it contended, should become the "de facto default terms of work for barristers".

9. The Committee agreed in principle that barristers should provide their services on a contractual basis, like all other professionals. The Committee also accepted that it was impracticable to negotiate on each occasion a barrister was instructed the full terms on which those instructions were given. It was, therefore, appropriate for there to be standard or default terms of business, which could be used, subject to amendment, if the parties wished to do so.

10. The terms of business proposed by the Bar Council for this purpose were, however, wholly unacceptable. They were entirely one-sided, and failed to reflect market realities or reasonable client expectations. The Committee felt that the Legal Services Board should not approve the necessary changes to the Bar's Code of Conduct unless and until the Bar Council negotiates and agrees with all appropriate interested parties balanced terms of business. The Litigation Committee would be prepared to take part in any such negotiations.

SRA's draft Code of Conduct

11. The Chairman said that the SRA (encouraged by the Legal Services Board) proposed to move to "outcomes-focused regulation", instead of relying on a detailed rulebook. The SRA intends to implement the new Code in October 2011. The City of London Law Society supported this move in principle, subject to considering the terms of the proposed new Code of Conduct. The Committee was asked to provide comments on the SRA's draft Code of Conduct to the Professional Rules and Regulation Committee, which would co-ordinate the Society's response.

12. The Committee considered Chapter 5 (Your client and the court) of the draft Code of Conduct. It noted that, in most cases, redrafting the current code of conduct in terms of outcomes rather than rules was a change of form rather than of substance. Comments on the draft of Chapter 5 included the following:

    (a) Outcome 6. This was felt to be too broad, and should be confined to safeguarding the wellbeing of a solicitor's own client, not of the other side in litigation.

    (b) Indicative behaviour B. While solicitors should advise their clients of the consequences of failing to comply with a court order, it is less obvious that solicitors should be professionally obliged to advise their clients to comply with court orders. That was a matter for clients to decide. The advice that solicitors could give on such matters should not be dictated by the Code of Conduct.

    (c) Indicative behaviour D. This was felt to be too vague.

    (d) Indicative behaviour E. There was discussion as to whether solicitors should require their clients' consent before correcting solicitors' own inadvertent mistakes, but, particularly in view of the potential overlap with indicative behaviour F, it was agreed that this should remain.

    (e) Indicative behaviour H. It was not clear what this added to Indicative behaviour C.

    (f) Indicative behaviours I(ii) and J(ii). These overlap, and it is not clear why the wording is not consistent.

13. The Committee also:

    (a) wondered whether it was appropriate to impose a professional obligation on solicitors to run a practice "in accordance with proper governance" (Principle 8); and

    (b) questioned whether an obligation only to enter to fee agreements considered by solicitors to be in their clients best interests (Chapter 1, Outcome 5) was appropriate or practicable.

Other business

14. In addition:

    (a) The Committee considered the application by Geraldine Elliott of Reynolds Porter Chamberlain to become a member of the Committee. The Committee would be delighted to welcome Geraldine as a member.

    (b) The Chairman reported on a meeting of the Society's Committee Chairs held on 10 June 2010. He noted, in particular, that the Society was keen to secure publicity for the work of its Committees.

(c) The Chairman referred to his email of 26 May 2010 regarding privilege and *Prudential v Special Commissioners* before the Court of Appeal. No examples of the sort requested by the Law Society had been provided. The Committee also noted that the ICAEW had, like the Law Society, been given permission to intervene in the appeal.

(d) Hardeep Nahal said that he had been informed by Bob Musgrove, the Chief Executive of the Civil Justice Council, that he (Musgrove) would in October become the registrar of the court established in Qatar as part of the Qatari Financial Centre. Mr Musgrove offered to talk to the Committee about this. The Committee was of the view that this would be more interesting after Mr Musgrove had done the job for some time. It would also potentially be of interest to a wider audience than just the Committee.

(e) Tim Hardy referred to Lord Lester's defamation bill and, in particular, clause 11, which required a body corporate to show that it had suffered substantial loss before it could claim for defamation. This requirement would prevent most corporate defamation claims. The bill was due to have its second reading in the House of Lords on Friday 9 July 2010. Tim would explore further the position of the bill, and would consider whether it would be appropriate for the Committee to make representations about it.

15. The next meeting of the Committee is scheduled for Tuesday 28 September 2010 at 4pm.