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PAPER 1

# Legal aspects of running a financial counselling service



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## 1. HISTORICAL PERSPECTIVE: THE CHANGING NATURE OF FINANCIAL COUNSELLING

In the early days of financial counselling, most clients were disadvantaged people with financial difficulty revolving around survival issues: rental problems, often with Homeswest; utilities problems with disconnections, and consumer debt often involving pay day loans. This relatively small range of issues entailed a very modest level of risk.

In recent years there has been a change in the clientele. With changing economic times, more of the clients seeking help from financial counsellors are sophisticated clients with more complex matters. As well as increasing levels of economic difficulty in the community, there has recently been a fall in property values. This means that where once a family in serious financial difficulty could sell their house, pay out their debts, and perhaps have a useful sum to start again, homeowners now find that properties bought in the last few years are often worth less than the amount owing on their mortgages. If they are forced to sell, they will have a shortfall.

Another factor changing the nature of financial counsellors' clientele is that contact details for financial counsellors are now included on default notices.<sup>1</sup>

These changes to the clientele mean financial counsellors are now required to deal with a wider range of issues, and more complex issues than the day-to-day survival difficulties faced by disadvantaged clients in times gone by. Along with these changes in the sort of matters clients present with is the fact that

the dollar value of the types of problem has increased greatly. With this change in dollar value, and complexity, comes increased risk to counsellors and agencies.

### 1.1. DEALING WITH COMPLEXITY

A financial counselling service faced with this increasing complexity and risk has two broad alternatives. One is to accept everyone who walks through the door and to be everything to everybody. This approach is easy to fall into; financial counselling is a helping profession and most counsellors are motivated by a wish to help everyone.

The alternative is to practise some variety of client selection or matter selection. How can client selection work?

### 1.2. CLIENT SELECTION OR SCREENING

The starting point in client screening is the obligations created by the service's funding agreement. If the funding agreement requires a specific group of clients be assisted, that determines that issue. If the funding agreement is silent on this issue, the next consideration is the service agreement or letter of engagement the agency uses.

### 1.3. SERVICE AGREEMENT OR LETTER OF ENGAGEMENT

Is there a difference between these two items? A letter suggests one-way communication. An agreement suggests offer and acceptance. It is ideal if the client signs the document. A letter can be so drawn that the client is expected to sign it. It is undesirable to proceed in a counselling relationship without a signed letter of engagement or service agreement. Why is this so?

The financial counselling profession is not defined in a precise way that limits its boundaries. If a court considers the legal relationship between a financial counsellor and a client, it may use the concept of an agency relationship. There is a substantial body of law that defines the rights and obligations of principal and agent, developed from a commercial context. This may be inappropriate outside a commercial setting.

The great benefit of using a letter of engagement or service agreement is that the rights and obligations of client and agency can be defined clearly.

### 1.4. SCOPE OF ENGAGEMENT

Particularly in the light of sophisticated clients with more complex matters we looked at earlier, the most valuable thing which the letter of engagement or service agreement can do is to describe the nature and limits of your service. The letter of engagement or service agreement should:

- set out what financial counselling is, what you can do for a client and what you cannot do. It is vital to make it clear that the nature of financial counselling is to assist clients to manage their own financial situation more efficiently and effectively. It must be emphasised that your service does not give legal or accounting advice. If your service has the word 'legal' in its name, this is an important point to deal with. A service which describes itself as a 'legal service' may well be held to the professional standards and requirements of a legal practice.

### 1.5. DURATION OF ENGAGEMENT

In most professional relationships there is no particular duration expected. The general expectation is that the relationship will continue as long as there is a need for it. Financial counselling agencies may have a funding obligation to deal with a set number of clients in a month or year. This may necessitate avoiding the accumulation of clients whose matters go on for a long time. Ideally, a financial counselling relationship should have a defined and achievable aim and be arranged so there is a clear goal which can be attained in a modest timeframe; weeks or two or three months. Clients with a dependent personality, or mental or emotional problems which prevent them from dealing realistically with their financial difficulties, should be referred to a specialist agency.

## **1.6. MANAGEMENT OF CLIENT EXPECTATIONS**

A major role in creating a service's agreement with its clients is setting limits on client's expectations. As well as setting out what your service can and cannot do, discussed above, the service agreement must say clearly that you cannot guarantee a particular outcome. For example, if the client's burning desire is to keep their house, it is necessary to be firmly realistic. Not only is it necessary to say to the client that you can only agree to assist the client to achieve the best outcome, which is reasonably obtainable, but to put that in a letter to the client. Tearful and demanding clients who insist you save their house must be discouraged right from the start. It is important that you and your service say 'no' when this is appropriate.

## **1.7. USE OF DISCLAIMERS**

A disclaimer is a term in a contract which attempts to exclude or limit a party's liability in contract or tort. Such clauses can be effective in limiting the liability of the party preparing the contract.<sup>2</sup> However, this principle must now be considered in the light of the Unfair Contract Terms provisions of the Australian Consumer Law. This provides, amongst other things, that a standard form contract – that is, pre-printed and presented to a client or customer for signing – can be examined to see if its terms create a significant imbalance between the rights of the consumer and those of the organisation preparing the contract. If a term of a standard form contract does breach this test it can be ruled to be void. For that reason, I am

sceptical of the value of a bald and all-encompassing disclaimer or exclusion clause. I believe a more reliable way to manage risk is to set out clearly what your service can do, and what it cannot. Terms in a consumer contract that define the service being supplied are exempt from the test of unfairness.<sup>3</sup>

## **1.8. INFORMATION V ADVICE**

One traditional idea relating to management of risk in financial counselling is to provide information rather than advice to clients. What is the difference?

The meaning of providing information is fairly clear. The meaning of advice is more complicated. A useful definition of advice is contained in section 766B of the Corporations Act 2001 (Commonwealth), in defining financial product advice. Advice is a recommendation or statement of opinion that is intended to influence a person making a decision in relation to a particular matter.

An example is that providing information to a client in financial hardship about accessing superannuation could be done by giving the client pamphlets or brochures about the subject or informing the client about websites containing relevant information. Providing advice to the client would be suggesting to the client that it is desirable to leave their superannuation where it is, because it is protected from creditors.

In my view, it is usually true that offering information is safer than providing advice. However, it is an approach that has its limitations.

The first is that the difference can be argued to be rather artificial. Selection and presentation of particular information in a particular context may have much the same effect as offering straightforward and relevant advice. Another is that if a client is provided with information but uses it unwisely, the client may feel aggrieved, and wish to complain if things go badly. The client may argue that if the counsellor had provided relevant and helpful advice they would have made a better decision. Another limitation is that some argue that merely providing information to clients is downgrading the capacity and skills of financial counsellors. In many cases there are clear benefits to some courses of action, and clear detriments to others, and counsellors can use their knowledge and skills to the benefit of their clients by providing relevant and timely advice.

### **1.9. KEEPING RECORDS**

A good memory is no match for a bad pen nib.<sup>4</sup> It is clear that written records are much more reliable and durable than human memory. There are three principal reasons why keeping written records is valuable to a financial counsellor or the agency.

The first is that it makes it easier to deal efficiently with the client's matter. It enables counsellors to review what has happened so far in a particular matter, and to keep it moving in a productive way.

The second is that it enables another counsellor from the agency to pick up the file and deal with the client without inefficient recreation.

The third reason is that in the event of a complaint or disagreement with the client, a clear written record of what has been said and done is very valuable. Many clients come to financial counsellors stressed or distressed, and some have discussed their problems with a number of people. The client may well have an inaccurate recollection of what was said or done in a particular interview with a financial counsellor. A written record of what was said and done can establish the true facts, which in many cases will show a complaint is ill-founded.

### **1.10. WHAT RECORDS SHOULD BE KEPT?**

The counsellor's file notes and the client's instructions to the agency belong to the agency, which should keep them. Major correspondence and important documents usually belong to the client. There is no need to keep original documents. Copies are fine, and the originals can be handed back to the client. The agency owns the originals of the counsellor's file notes, and any written instructions from the client, and should keep them. Similarly, the agency owns copies it has made of letters or documents.

### **1.11. FOR HOW LONG SHOULD RECORDS BE KEPT?**

Seven years is a sensible time to keep the important parts of the file. If the agency has extensive capacity for archival storage, ten years is good aim. Very few matters more than ten years old arise again.

### **1.12. REFERRAL OF CLIENTS**

With the advent of more sophisticated clients and more complex matters, more counsellors are finding themselves asked to deal with matters outside the boundaries of financial counselling. An example is a client who has conducted a business using a company or trust structure, and now wants help in unravelling it. It is a matter for each agency to determine its own policy, however my view is that a matter involving legal issues should be referred to a different source of assistance, for example a commercial insolvency practitioner, or the Small Business Development Corporation.

### **1.13. IF THERE IS A COMPLAINT**

From time-to-time clients are unhappy with the outcome of their matter and make a complaint. There are a number of aspects to consider if this occurs.

### **1.14. ANALYSE, DO NOT APOLOGISE**

It may be a polite response to people making a complaint to apologise to them for what your service has or has not done, however there are legal reasons why this is not a good approach.

The fact is that an apology may be taken to imply an acknowledgement of shortcoming or wrongdoing by the counsellor or agency. In many cases analysis of the client's complaint may show the client has an incorrect or incomplete recollection or understanding of what has happened and apologising to them may reinforce their incorrect belief.

The second is that the agency's professional indemnity insurance policy may require that the insured person or organisation does not admit fault or offer compromise. Apologising may put the counsellor or agency in breach of its insurance obligations, perhaps jeopardising the cover.

### **1.15. EXAMINE THE FILE**

It is vital to read the file carefully to see exactly what took place. Establishing what the client asked the counsellor or agency to do is the first step. The fundamental questions to be asked are:

- Who is or was the client? This is normally the person who has signed the letter of engagement or service agreement. This underscores the importance of clarifying right at the start of the engagement who the client is.
- What did the client ask the agency to do? This emphasises the importance of recording carefully what the client asks the counsellor and agency to do.
- Was there issue creep? Did the client begin by asking the agency to do something simple and straightforward, then bring in new matters or problems? Again, clear documentation not only of the client's initial request, but of any change to that is very useful.
- Did the counsellor set out to achieve the outcome initially agreed upon? Was this outcome achieved?
- Did the issue or problem at the base of the complaint arise from the client having unrealistic expectations?
- Has the issue or problem at the base of the complaint arisen from something the client did not ask or raise?

- Has the client dealt with a number of helping agencies? A client shopping around for assistance from a number of agencies may well be confused about who they have dealt with, and what they asked each person or agency to do.

### **1.16. INSURANCE**

A financial counselling agency should have a professional indemnity insurance policy.

While claims against counsellors and agencies are very rare, if a problem does arise it is very comforting to know that an insurance cover will protect them if necessary. As mentioned earlier, a professional indemnity insurance policy will normally require the insured person or agency to avoid admitting fault or liability. It is also likely to require prompt notification not only of a claim made against the person or organisation insured, but also notification of circumstances which may give rise to a claim.

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## **2. SUMMARY – ACTION WHEN A COMPLAINT IS MADE**

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1. Locate and read the file, underscoring the importance of keeping good records.
2. Check the identity of the person making the complaint against the file to ensure it is the same person and same matter.
3. Do not apologise. If anything, give a non-committal reply such as, "Thank you for your letter. We are examining the matter you refer to." This reply should be headed 'Without Prejudice.'
4. Check the letter of engagement or service agreement to see what the client requested, and what the agency agreed to do.
5. Clarify what were the aims or goals of the engagement. Were these goals achieved? If so, there is little basis for complaint. If not, establish what went wrong.
6. Contact the professional indemnity insurer and advise of a possible claim.
7. Use the process of doing these things to improve record keeping and matter management in the future.

### **ENDNOTES**

- 1 Form 12A National Consumer Credit Protection Regulations 2010.
- 2 Toll (FGCT) Pty. Ltd. v Alphapharm Pty. Ltd. [2004] 219 CLR 165.
- 3 The Australian Consumer Law (section 26 (1)).
- 4 A proverb from the Kangxi reign in the Qing dynasty.