

***Common Ethical Pitfalls to Avoid:
A View from the Legal Profession
Complaints Committee***

Gael Roberts

Law Complaints Officer

Legal Profession Complaints Committee

COMMON ETHICAL PITFALLS TO AVOID: A VIEW FROM THE LEGAL PROFESSION COMPLAINTS COMMITTEE

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These notes outline in brief some of the key ethical issues currently before the LPCC.

Before commencing that outline, it is timely to consider what it means to be part of a profession and the concept of 'professionalism'. The commonly accepted view is that a profession requires knowledge of some department of learning, enjoys a degree of self regulation, normally enjoys a monopoly in the provision of services to the public and has some public service claim. What distinguishes the legal profession from other professions, however, is the status of a legal practitioner as an officer of the court and the part that the legal profession plays in the administration of justice.

But what is professionalism? This concept was the subject of a paper given last year by Mr Steve Mark, the Legal Services Commissioner for New South Wales, where he examined what professionalism is and how it applies to the legal profession:¹

"Professionalism has ...been described as the aspirations, conduct and qualities that make a professional person. Former American Bar Association (ABA) President Jerome Shestack identified six components of professionalism: "ethics and integrity, competence combined with independence of judgment, meaningful continuing learning, civility, obligations to the justice system, and pro bono service." (Shestack 1998) From this we have come to understand that the ethical rules of a profession represent merely the minimum standards below which a lawyer's conduct must not fall, and 'professionalism' is a higher standard of conduct that all lawyers should aspire to.

For the OLSC [Office of the Legal Services Commissioner] professionalism is fundamental to the practice of law. As a regulator of the legal profession the OLSC has a societal obligation to ensure that lawyers demonstrate not only adherence to the stated professional and ethical requirements imposed by the

¹ Mark S, Regulating for Professionalism: The New South Wales Approach (5 August 2010), 4-5.

practice rules but that they also demonstrate professionalism in practice. The OLSC's obligation to ensure this arises from its position in society as a bastion for consumer protection and protection of the rule of law."

As legal practitioners you are part of a profession which not only brings with it a certain status (and often monetary benefits associated with that higher socio-economic standing) but it also comes with obligations – obligations to the courts and the administration of justice and to your clients. Like Steve Mark, I am also of the view that professionalism is fundamental to the practice of law. At the bare minimum you are required to comply with your ethical obligations but I would urge you to strive higher to attain professionalism in your work and the way in which you conduct yourselves.

So what are some of those common ethical standards that are often not being complied with?

Professional Integrity

Professional Courtesy

Practitioners are required to be courteous in all dealings with clients, other practitioners and other persons involved in a matter where the practitioner acts for a client: Rule 6(1)(b) of the Legal Profession Conduct Rules 2010 (*LPCR*).

This requirement covers not only written communications but also oral exchanges. As the Law Society's Ethical & Practice Guidelines provide:²

"Politeness does not prevent effective communication. It is possible to display firmness and resolve in pursuing a client's interests without descending into emotional, insulting, offensive, discriminatory, rude or intimidatory language."

The State Administrative Tribunal recently viewed a number of exchanges between two practitioners whose clients were involved in litigation against each other. The Tribunal had the following to say:³

"In these reasons we have set out at some length the communications between [the practitioner] and [the solicitor for the other side], and relevant portions of affidavits made or prepared by [the practitioner]. Those documents reveal a troubling tendency in this litigation for [the practitioner] to write in intemperate

² The Law Society of Western Australia, *Ethical & Practice Guidelines* (7 September 2010), [2.5].

³ [2011] WASAT 1 at [139].

and offensive terms in relation to the opposing solicitor and the opposing client. As we have found, a number of those communications went beyond the bounds of acceptable professional conduct. In the proceedings before the Master, he cautioned [the practitioner] 'to be extremely careful in relation to your dealings with other solicitors'. That is advice with which we agree. The interests of clients and the proper administration of the law are served by practitioners extending to each other proper professional courtesy. Resort to personal abuse leads to a loss of the objectivity that is necessary for proper legal representation, and results in distraction from the real issues in the client's dispute. This case is a good example of that proposition."

The bulk of the communications from the practitioner which were the subject of those proceedings were emails. In many of the complaints the Committee has received recently in which discourtesy has been an issue, the offending correspondence has been emails or even text messages. It appears that practitioners are not treating these forms of communication with the same care and attention as letters. They are often addressed less formally and appear to have been written in a hurry without due care being taken to check not only the appropriateness of the content but also the numerous typographical and grammatical errors.

All work communications should display professionalism. Email is a very quick, effective tool but the same care and attention should be applied to communications sent using this form as would be applied to a letter printed on letterhead which is signed. The process of dictating or typing a letter, printing it out, reading it and then signing it, provides a practitioner with time to reflect on the substance of what has been written to ensure its correct and an appropriate tone has been used. The same care is needed for emails, particularly if they deal with more than just procedural matters or are written direct to an unrepresented party or even a third party.

Most of the discourtesy complaints arise out of highly charged litigation where emotions are running high. Even though it may be difficult at times, practitioners need to exercise restraint in these situations and not descend into exchanges which are discourteous.

Intimidation

The Committee has recently seen an increase in practitioners using threats to cause extraneous detriment in order to further their clients' interests. The threats have all been made in the context of letters of demand sent in civil disputes. Some examples include a threat to:

- lodge a formal complaint with the police;
- report the matter to the “relevant authorities”;
- lodge a complaint with the LPCC.

In each case, the threat was coupled with a demand for monies or the return of property (including in one case a client file) and was considered to be inappropriate because it was over and above what was necessary to pursue the clients' demands. The conveying of such threats is intimidatory and does not assist the resolution of disputes; indeed, it has the capacity to inflame the situation and, in extreme cases, has the potential to breach s.397 Criminal Code.

Again, practitioners need to exercise restraint in drafting letters of demand to ensure they only seek to demand what is recoverable under the due process of law and only refer to the taking of debt recovery proceedings should the demand not be met. A request or demand to another practitioner should never be coupled with a threat to report that practitioner to the LPCC.

Furthering a client's case by unfair means

Practitioners must not attempt to further a client's matter by unfair or dishonest means: Rule 16(1) LPCR.

The Committee has recently seen some conduct which, if done deliberately or recklessly, may have breached this rule.

The conduct in each instance arose as a result of a practitioner trying to help the client, but in the process perhaps forgetting that they have a higher duty to the administration of justice.

The type of behaviour which may be covered by this rule includes knowingly or recklessly:

- relying on a statute to assert that another party (often unrepresented) has fewer rights than what are in fact available under an agreement with the practitioner's client;
- asserting to an unrepresented party that the client has rights which the client does not have;
- giving a client wrong advice about whether they have certain rights merely for the purpose of achieving the client's desired outcome (such as a delay in having to perform an act) and advancing those arguments on the client's behalf.

Practitioners need to take care that they are exercising professional independent judgment

because as the State Administrative Tribunal has stated:⁴

“Both in respect of litigation and in providing legal advice and assistance generally, a practitioner is not a mere agent and mouthpiece for his client, but a professional exercising independent judgment ... and providing independent advice. Moreover, where practitioners give advice to a client that their professional responsibilities do not allow them to act in accordance with the client’s preferred course, and that should the client insist they must therefore decline to act, it seems unlikely the client would reject that advice and go elsewhere. Apart from the issues of dependence and cost, the client would, in the usual case, be faced with the same response from the new lawyer.

The lesson from a case such as this, is that where the client’s instructions may run counter to normal ethical principles and a practitioner’s own personal standards, he or she should think seriously before proceeding in accordance with those instructions. Practitioners who engage in misleading conduct or sharp practice can hardly expect to receive the trust and respect of their colleagues (much less of the Court). Yet such trust and respect is a fundamental requirement of a practitioner’s practice if he or she is properly to play his or her part in the administration of justice and adequately to serve the interests of his or her client.”

Costs

This is the one area which has in the past and continues to give rise to the majority of complaints – roughly a third of all complaints last year had a cost component. Although some complaints may refer to other concerns, often the real crux of the problem is costs. Resolve the costs issue and the other concerns often fall away.

There are many issues surrounding costs which I could cover but some of the issues which I wish to highlight are:

Disclosure

Problems generally start at the commencement of the solicitor/client relationship. Although most practitioners comply with the costs disclosure requirements in Part 10 of the *Legal Profession Act 2008* (LPA), clients are still left not understanding how they will be charged. If

⁴ [2006] WASAT 352 at [70-71].

you are dealing with clients who are not familiar with lawyer's charges it is advisable to take the time to properly explain your charges rather than just handing over a retainer agreement which sets out the charges. Clients need to know what to expect as far as charging is concerned.

Once the retainer agreement is signed, keep the client informed about charges. What often happens is that the retainer agreement is filed away and forgotten until a dispute arises. If charge out rates change, inform the client. Keep the client advised about your costs on a regular basis and revise estimates. When a bill is issued, ensure that it accords with the terms of the retainer agreement. Very often practitioners issue bills assuming there is a retainer agreement only to find out, after being queried by the client or the LPCC, that there is no such agreement.

The Committee has seen some practitioners relying of the exclusion in s.263(2)(a) LPA which provides that disclosure is not required if the total legal costs, excluding disbursements, are not likely to exceed \$1,500, but then not advising the client that the costs being accrued have exceeded that amount. Practitioners need to be alert to costs being likely to exceed \$1,500 and disclose that fact to the client and give disclosure as soon as practicable: s.263(3). If this is not done, the client does not need to pay the practitioner's costs unless they have been assessed and as part of that assessment the taxing officer may reduce the amount of costs by an amount proportionate to the seriousness of the failure to disclose: s. 268(1) & (4).

The Committee is also seeing a rise in 'friends' complaining about practitioner's bills. Due to the prior relationship between the practitioner and the friend (who then becomes a client), the practitioner has not properly dealt with the issue of costs at the outset. Very often there is no costs agreement and disclosure has not been given. Just because the person is a friend at the outset does not mean that they will be at the end of the legal process. Don't cut corners – deal with costs as you would any other client.

Overcharging and improper charges

The State Administrative Tribunal has recently handed down a decision which examines solicitor's charges in the context of personal injury matters, although some of the charging methods appeared to be peculiar to that practitioner rather than widespread amongst solicitors. Nevertheless, some of the matters to note from that decision (which is the subject of appeal) are:⁵

⁵ [2011] WASAT 95.

1. in reaching a finding that the practitioner's charges in one of the matters were grossly excessive, the Tribunal commented on the lack of proportionality between the damages and the fees charged in one of the matters where the claims for damages arising out of two motor vehicle accidents were settled for a total of \$50,000 plus costs (eventually taxed at \$11,089.31) and the fees charged in total amounted to \$36,271.55; [108] & [141]
2. an overcharge of \$400 (which arose due to the duplication of a charge) is not insignificant to a client of limited means; [152]
3. in applying the relevant costs determination, a practitioner is not entitled to charge at an hourly rate for merely clerical, secretarial or administrative work carried out by a clerk (reaffirming the decision in *D'Alessandro and D'Angelo v Bouloudas* (1994) 10 WAR 191), but this exclusion did not apply to phone calls by clerical staff to medical practitioners in relation to their availability at trial as this was considered to be part of the preparation of the matter for hearing; [71, 151]
4. minimum charges of one or two units for particular work inevitably led to charges at effective hourly rates significantly in excess of the permissible hourly rates under the relevant costs determination – the practitioner in this case had a provision in his costs agreement permitting the charging of two units of time per page of correspondence and minimum charges of one unit for telephone calls; [81, 151]
5. a provision in the practitioner's cost agreement permitting interest to be charged on unpaid fees (apparently put into the cost agreement in lieu of periodic invoicing) had the effect of permitting charges in excess of the amount permissible under the relevant costs determination; [89]
6. an irrevocable authority (sought when the client appointed a new solicitor and was seeking the hand over of his file) to pay the practitioner's fees was not in appropriate terms as it should have referred to the practitioner's reasonable fees; [220]
7. 30% in excess of what is considered to be a reasonable charge amounts to a grossly excessive charge. [281]

Some of the other charging practices which the Committee is seeing at the moment, which are of concern are charging for:

- research on points of law which were not such as to warrant charges being made;
- time spent downloading Tribunal decisions;

- intra-office conferrals where each solicitor charges their time and the time for preparing intra-office memos;
- charging for work done by summer/winter clerks and articled clerks and for a legal practitioner to settle that work;
- purely administrative tasks eg preparing a covering email to accompany a letter;
- work done to correct the practitioner's own error;
- social occasions with clients;
- professional time for administrative tasks of updating and collating files.

Communication

I have dealt with the failure to communicate properly and effectively with clients in relation to costs above. This remains one of the major causes for complaints. Another area where communication is a problem is with the giving of advice.

A practitioner must take all reasonable and practicable steps to inform a client of the client's rights and possible courses of conduct in relation to any matter in which the practitioner represents the client: Rule 10(1) LPCR.

The Committee often has the need to review practitioner's files. Too often, those files do not contain any clear written advice to the client about the client's rights and possible courses of conduct. The clients are complaining about lack of advice and the practitioner is left relying on having given oral advice and perhaps having some file notes of that advice. Although it is good practice to advise clients in person about their rights it is also good practice to put that advice in writing. Although this may add to a client's costs, at the end of the day it is better for the client to have received clear advice and may resolve a complaint later on that you failed to properly advise the client.

Delay

A practitioner must perform the work required on behalf of the client diligently: Rule 7(e) LPCR.

The definition of unsatisfactory professional conduct includes conduct of a practitioner which falls short of the standard of diligence that a member of the public is entitled to expect of a reasonably competent practitioner (s.402 LPA). However, if a practitioner's conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of diligence that may amount to professional misconduct (s.403(1) LPA).

Diligence refers to care and perseverance in carrying out the task a practitioner is retained to do. To comply with this standard, practitioners must keep their clients informed, seek appropriate instructions, act on instructions and complete or progress the work in a reasonable time.⁶ Accordingly, undue delay in acting on instructions and completing or progressing work can amount to unsatisfactory professional conduct or even professional misconduct.

Some recent findings by the State Administrative Tribunal which have involved a lack of diligence are:

- a practitioner was found to have engaged in unsatisfactory professional conduct and was fined \$6,000 – the practitioner's conduct included failing to attend at two hearings scheduled in the Magistrates Court, to comply with orders made by the Magistrates Court and to inform the client of significant developments;⁷
- a practitioner was found to have engaged in unsatisfactory professional conduct in failing to adequately, or at all, progress a client's claim between June 2006 and June 2007 – penalty (and an appeal) is pending.⁸

During the last year, the Committee has also exercised its summary conclusion powers in respect of the following matters involving a lack of diligence:

- a practitioner was fined \$750 – involved a failure (over a period of 17 days) to immediately notify clients of the service of a summary judgment application and the orders that were made on the hearing of the summary judgment application in circumstances where interest was accruing and vacant possession of the property was required to be given within 28 days;
- a practitioner was fined \$1,500 – involved a failure (over the course of 14 months) to brief a cost consultant to prepare bills of costs for taxation as instructed and failure to respond to numerous letters from the instructing agent in the matter;
- a practitioner was fined \$2,000 – involved a failure to act on a client's instructions (for a period of two months) which resulted in a proposed settlement falling through and a notice of default being issued and a failure to communicate with the client (over a period of 8 months);
- a practitioner was reprimanded – involved a failure to expeditiously obtain

⁶ Le Miere J, *Negligence and Professional Misconduct* (March 2011), unpublished, 6.

⁷ SAT VR 11 of 2011.

⁸ [2011] WASAT 95.

judgment and to serve documents on the judgment debtor (the work was being carried out albeit slowly over a 2 year period);

- a practitioner was fined \$1,000 – involved a failure to carry out a client's instructions to discharge a mortgage (over a period of 2 months) when court orders had been made requiring transfer of the property to the wife within 35 days and the failure to keep the client properly informed (over a further period of 2 months).

Pressure of work is no excuse. If you are responsible for a matter and find that you cannot deal with it in a timely manner, you must take active steps to inform your client of the problem and see what alternate arrangements can be made, if necessary. It is also important, particularly for sole practitioners, to remember not to take on matters which you will be too busy to handle or which, because of the size or complexity, will be beyond your means to handle in a timely manner.

Dealings with the LPCC

I must also take this opportunity to highlight the requirement for a practitioner to be open and candid in his or her dealings with a regulatory authority: Rule 50(2) LPCR. It is also a requirement to respond to requests from the LPCC within a reasonable time: Rule 50(3)(a) LPCR.

As the State Administrative Tribunal has said:⁹

“A practitioner's obligation to respond to a professional disciplinary body is a serious obligation. If the public is to continue to have faith in the extent to which the legal profession regulates its member's professional conduct, then it must be satisfied that practitioners respond in a timely manner, produce documents requested, and otherwise give full co-operation to any enquiry into their conduct by the Committee.”

The best approach is to provide a full and frank response to any complaint. Don't make a matter worse by misleading the Committee. If there is evidence that a practitioner has knowingly or recklessly misled the Committee, the matter will invariably end up in the Tribunal. The Tribunal views such matters seriously as evidenced by the citing of the following principle:¹⁰

⁹ [2006] WASAT 251 at [65].

¹⁰ [2009] WASAT 205 (S) at [9].

“A solicitor is under a duty of candour when dealing with courts and regulatory or disciplinary authorities investigating a complaint against him or her, and a breach of that duty constitutes professional misconduct which is treated very seriously: ***A Solicitor v Law Society (NSW)*** (2004) 216 CLR 253 at [30] and [38].”

If you have done something wrong, the best approach is to provide a full response detailing what occurred and set out any mitigating factors.

Assistance with answering complaints is now available from silks and senior juniors for either no charge or for a nominal or modest fee. Any practitioner requiring such assistance should contact the Western Australian Bar Association President or Executive Officer at Francis Burt Chambers on 9220 0444.

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