AVOIDING PRACTICE HAZARDS

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1.0 Introduction

1.1 The Legal Profession Complaints Committee (the ***Committee***) has the power to conduct an audit of an incorporated legal practice to review its compliance (and that of its officers and employees) with the relevant provisions of the *Legal Profession Act 2008* (the ***Act*). These audits look at how ILPs deliver their legal services and seek to ensure that practices implement "*appropriate management systems*" to facilitate the provision of legal services in accordance with the professional obligations imposed under the Act and ancillary regulations and professional rules. The audits assist the Committee to monitor and maintain the professional standards of practice expected by and of legal practitioners.

1.2 Since the first audit was conducted in 2013 the Committee has identified a number of issues that require careful management by legal practitioners. Many of these issues are common to all legal practices and effective management of them can therefore be of value to all practitioners. In this paper, I will discuss the common types of issues that have been identified during the conduct of these audits and that may be faced by any legal practitioner, practicing through an ILP or otherwise. I will then discuss the implementation of various procedures and management systems that will assist practitioners in avoiding these issues.

2.0 The Legal Profession Complaints Committee

2.1 The Committee is a statutory body established by Part 16 Division 2 of the Act. Its functions are identified in section 557 of the Act and include the supervision of the conduct of legal practitioners and inquiring into complaints for the purpose of determining whether a practitioner's conduct may constitute unsatisfactory professional conduct or professional misconduct. When investigating a practitioner's conduct the

Committee considers the requirements of the Act and also the obligations under the *Legal Profession Conduct Rules, 2010* (***Conduct Rules***) and the Law Society's Ethical and Practice Guidelines (25 August 2015).

2.2 To give you some perspective, each year the Committee receives around 1400 inquiries and/or complaints concerning the conduct of legal practitioners in Western Australia. The areas of complaint giving rise to the majority of new inquiries/complaints during the last financial year were costs issues, unethical conduct (including discourtesy), lack of communication and delay. The areas of law which generate the most complaints are family law, probate and wills and civil litigation.

2.3 The Committee's Annual Report for the year ending 30 June 2015 contains some statistics which provide further insight into the types of complaints received by the Committee and which identify certain "*risk factors*".

2.4 During 2014/2015 year the Committee's Rapid Resolution Team dealt with 1341 inquiries of which 19% were conciliated. Over a third (37.3%) of the inquiries/complaints were made by a client or a former client of the practitioner. About a fifth (20.6%) was made by the other party to the transaction or proceedings in which the legal practitioner was involved.

2.5 Whilst family/de facto law accounted for nearly a quarter (23.9%) of matters, of note is the recent "*spike*" in the percentage of complaints in the probate and wills area. 19.5% of all complaint files opened during the 2014/2015 year related to this area of practice, an increase from 4.5% and 9.7% in the previous 2 years.

2.6 Of the complaints/inquiries made in the 2014/2015 year, 45% were made against practitioners in a sole practice. This is consistent with a trend that has been apparent for some decades. Also of note is the increase in the percentage of complaints against suburban practitioners as over 50% of all complaints during the year were made against practitioners from this type of firm.

2.7 Whilst it can be dangerous to draw specific conclusions from such statistics, some potential "*risk factors*" can be gleaned from the data. First, whilst the client is the most likely source of a complaint, a significant number of complaints are made by the "*other party*" to a transaction or litigation. This should remind practitioners that professional obligations extend beyond the solicitor/client relationship and they should bear this in mind when dealing with other parties (especially those who are unrepresented).

2.8 Secondly, whilst family law matters generate the majority of complaints, the rise in complaints in the area of wills and probate is of concern. The reason for this is unclear, but may be due, in part, to practitioners venturing into this area, due to financial reasons, even though it is not within their area of expertise.

2.9 Thirdly, practitioners in smaller firms seem to generate the most complaints. Whilst this does not necessarily mean that practitioners in smaller firms are at a higher risk of complaint, it raises the possibility that there may be features of the smaller practice which enable or exacerbate dissatisfaction on the part of clients.

3.0 **Audit Procedure**

3.1 Part 7 Division 2 of the Act specifically deals with incorporated legal practices providing legal services. Section 118(1) of the Act authorises the Committee to conduct an audit of:

3.1.1 The compliance of an incorporated legal practice, its officers and employees with the requirements of Part 7 of the Act and the Conduct Rules (insofar as they specifically related to incorporated legal practices); and

3.1.2 The management of the provision of legal services by the incorporated legal practice.

3.2 At present, the Committee conducts these audits on a causal basis and, in particular, if there has been a noticeable increase in the number or significance of complaints received by the Committee concerning practitioners at the practice. Accordingly, the audits are generally targeted to the concerns which led to the audit being conducted.

3.3 The audits are conducted using the ten objectives set out in the "*Appropriate Management Systems*" guide used by regulators in other States as part of self assessment audit kits which practices can use to assess their compliance with the equivalent provisions of those in the Act. These kits can be downloaded from www.olsc.nsw.gov.au and www.lsbc.vic.gov.au. The ten objectives and a brief description of the appropriate management system is set out in Table 1.

TEN OBJECTIVES OF “APPROPRIATE MANAGEMENT SYSTEMS” FOR ILPs

AREA TO BE ADDRESSED	OBJECTIVE OF APPROPRIATE MANAGEMENT SYSTESM IN EACH AREA
1. Negligence	Competent work practices
2. Communication	Effective, timely and courteous communication
3. Delay	Timely review, delivery and follow up of legal services
4. Liens/File Transfer	Timely resolution of document/file transfers
5. Costs Disclosure/Billing Practices/Termination of Retainer	Shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer
6. Conflict of Interests	Timely identification and resolution of the many different incarnations of “conflict of interest”, including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc
7. Records Management	Minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding register of files, safe custody, financial interests
8. Undertakings	Undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OOLSC, courts, costs assessors
9. Supervision of Practice and Staff	Compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing; quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services
10. Trust Account Regulations	Avoiding failure to account and breaches of the Act in relation to trust accounts

Source
http:// www.lawlink.nsw.gov.au/lawlink/OLSC/II OLSC.nsf/pages/OLSC tenobjectives

3.4 Although the Act only requires appropriate management systems to be implemented and maintained by ILPs, such systems are recommended for all legal practices.

3.5 Once a practice is identified and all enquiries, complaints and investigations that are currently open in relation to the practice are considered, the Law Complaints Officer may decide to commence a formal audit of the practice. The Law Complaints Officer is authorised under section 118(2) of the Act to appoint officers of the Committee to conduct the compliance audit.

3.6 Once a decision has been made to commence an audit, the legal practitioner director of the ILP will be advised in writing of the purpose and structure of the audit. The notification will include a summary of the particular areas of the practice that have been identified as of concern which can include matters such as:

3.6.1 Diligence and competence

3.6.2 Supervision of legal work

3.6.3 Communication

3.6.4 Conflict of interest management

3.6.5 Identification and management of retainer

3.6.6 Billing practices

3.6.7 Records Management

3.6.8 Trust Account Regulation

3.7 In order to reduce the time required to complete the audit and to minimise disruption to the practice, some preliminary discussions are had with the legal practitioner director. The legal practitioner director is asked to provide to the Committee in advance a list of all current practice files as well as a list of closed files for a nominated period.

3.8 The practice director is also provided with a schedule of information that must be made available for inspection by the Committee during the audit including:

3.8.1 All procedure manuals such as induction manuals, file review procedures, procedures for locating files and tracing documents, procedures for monitoring

inactivity on files at pre-determined times, procedures for regular file reviews and diary systems, procedures for reporting to clients, procedures for time recording, policy and procedures for conflicts of interest and checklists for opening and closing files.

3.8.2 A list of all fee earners (including paralegals and administrative staff) and the number of files assigned to each fee earner and details of the dates and methods of file review for each delegated file.

3.8.3 Access to any precedent database and a list of resources available for legal research.

3.8.4 A list of attendance by all legal practitioners of the practice at CPD Seminars.

3.8.5 Details of all bank accounts maintained or operated by the practice as well as Trust Account details.

3.9 On a day that is mutually agreed legal officers from the Committee attend the offices of the practice and conduct the audit. Generally a trust account inspector will also attend.

3.10 Following completion of the audit a report is prepared and provided to the ILP and the Legal Practice Board in accordance with section 118(5) of the Act. The report may provide specific and immediate management system directions if the Committee has concerns that need to be addressed as a matter of priority.

3.11 I draw your attention to section 118(5)(d) of the Act which provides that the audit report "*may be taken into account in connection with any disciplinary proceedings taken against legal practitioner directors or other persons or in connection with the grant, amendment, suspension or cancellation of Australian practising certificates*." Notwithstanding what was the "*causal basis*" upon which a practice is initially identified for a compliance audit, the review of the practice may bring other matters to the Committee's attention which may then be investigated in accordance with the disciplinary provisions of Part 13 of the Act.

3.12 I now propose to discuss the most significant issues that have arisen during the conduct of the Committee's compliance audits, many of which can be alleviated by ensuring appropriate management systems are in place to assist practitioners in avoiding these "*practice hazards*".

4.0 Supervision of Practice and Staff

4.1 A practitioner's obligation to supervise their employees includes the general requirement to supervise legal work carried out by a person who is not a certificated practitioner. Section 12(2) of the Act prohibits a person engaging in legal practice unless the person is an Australian legal practitioner. Sub-section (3) sets out a number of exceptions to this prohibition including where legal work is carried out under the supervision of an Australian legal practitioner, *"as a paid employee of a law practice or in the course of approved legal training"*.

4.2 The nature of the supervision required to satisfy the legislative provision has been the subject of judicial comment in a number of cases. In *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213 the State Administrative Tribunal derived the following propositions from the judgment of Malcolm CJ in *D'Alessandro and D'Angelo v Bouloudas* (1994) 10 WAR 191:

4.2.1 The obligation of the practitioner to supervise is imposed in order to ensure that the client receives an appropriate standard of advice and service.

4.2.2 Failure to adequately supervise the work of a clerk may constitute unprofessional conduct.

4.2.3 The nature and extent of the obligation to supervise will depend upon the particular circumstances in which the solicitor's practice is conducted.

4.2.4 The level of supervision required will vary according to the level of competence and experience of the clerk but must remain supervision and not amount to complete delegation.

4.2.5 The supervising solicitor should settle and sign all of the clerk's letters (except formal letters).

4.2.6 There should be in place a system by which each file relating to a matter to which the clerk has the conduct is reviewed by the solicitors at appropriate periodic intervals.

4.2.7 Proofing witnesses and discovery and inspection of documents must be carried out under the direction of and specifically reviewed by the supervising solicitor.

4.2.8 So called general supervision which relies on the clerk bringing any difficulty to the attention of the solicitor is not sufficient.

4.3 The Tribunal continued at [124] that good legal practice requires a law firm or a sole practitioner who engages a law clerk and authorises the clerk on occasion to see a client to instruct those clerks to make their status clear and in addition, disclose to the client that they work under the direct supervision of a particular practitioner.

4.4 Consideration must also be given to section 105(3) of the Act which applies to all ILPs and requires a legal practitioner director to ensure that appropriate management systems are implemented and maintained in their ILP:-

4.4.1 to enable the provision of legal services by the ILP in accordance with the professional obligations of legal practitioners and other obligations imposed under the Act; and

4.4.2 so that those obligations of legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.

4.5 Section 105(4) provides that if it ought reasonably to be apparent to a legal practitioner director that the provision of legal services by the practice will result in breaches of obligations imposed by the Act the director must take all reasonable action to ensure the breaches do not occur and appropriate remedial action is taken in relation to the breaches that do occur.

4.6 Legal practitioners must be particularly mindful of these obligations when utilizing the skills of junior practitioners and employees who are not certified practitioners such as clerks, paralegals and administrative assistants.

4.7 Issues will arise when there is no system in place to prevent legal work being delegated to a clerk or paralegal so that they are placed in the position of giving legal advice - intentionally or otherwise. A supervisor must ensure that there are guidelines or protocols that inform paralegals of the restrictions that apply to the work they can carry out. This applies to all legal work and not just to work required to be undertaken by a practitioner personally, for example under the grant of legal from LAWA or where the work is migration work which must be undertaken by a registered migration agent.

4.8 A practice audited by the Committee engaged the services of law students as paralegal assistants and to assist in administrative tasks. Issues arose on a number of the files reviewed as:

4.8.1 On a significant number of files the matters were managed by a law student with no input from the legal practice director.

4.8.2 When asked about training and supervision provided to the students the practitioner advised the Committee that he trained all staff himself to save the costs of employing trained staff and that once trained, they were expected to record 5 billable hours a day.

4.8.3 There did not appear to be any system in place to ensure that the work delegated to the law students would not place a student in the position of giving legal advice intentionally or otherwise. There were no guidelines provided to the law students as to the restrictions on the work they could carry out. The law students prepared court documents, met and corresponded with clients and provided advice to clients.

4.8.4 The correspondence written by the law students went well beyond administrative letters. In many instances, law students emailed clients and opposing parties directly without any evidence of supervision by the practitioner.

4.9 As a result of the lack of an effective management system, issues had arisen on a significant number of files that appeared to be directly caused by an inappropriate level of supervision. For example:

4.9.1 Law students were required to attend directions hearings in the Family Court, in breach of the *Family Court Rules 1998*.

4.9.2 Advice was provided to clients that fell below the standards of diligence and competency expected of a legal practitioner. When a client asked for advice on what might happen during an upcoming court hearing he was advised "*Who knows exactly what will happen in court, but provided you have no skeletons in your closet (which I don't think you do) all should be fine*."

4.9.3 In another matter, a client sought advice on how to protect the family assets from her husband whilst he was an involuntary patient. She was advised that the husband would be unlikely to attempt to access the family bank accounts if she constantly gave him cash during her visits so that he felt like "*he already has cash available to him*".

4.9.4 Advice was given to a client seeking to ensure that the assets of a family trust solely benefitted the children (and not the step-children) of the family. The client was advised to direct the client to appoint the children as trustees of the trust "*so that they can distribute assets to themselves only"* suggesting an improper direction to the trustees as to the exercise of their duty.

4.10 A similar absence of effective supervision was identified during an audit at a busy suburban practice which encouraged an "*all hands on deck*" approach to advising clients. Unfortunately, this approach meant that:

4.10.1 On one file the firm secretary was directly involved (with no input from a legal practitioner) in the preparation and substantial amendment of documents at the instruction of the client.

4.10.2 On many estate files all correspondence was between the paralegal and the client including the provision of detailed advice in circumstances where it was clear that the paralegal was uncomfortable with the level of responsibility assigned to him which went well beyond that required of a junior solicitor.

4.11 To maintain an appropriate system for the adequate supervision of employees, practitioners are advised to consider the following:

4.11.1 If your firm is an ILP, be fully aware of your responsibilities as a legal practitioner director under the Act.

4.11.2 In any event, be fully aware of the general responsibilities as a supervisor of all non-legal practitioners under the Act.

4.11.3 Ensure that a legal practitioner settles and signs all correspondence and approves all emails before they are sent.

4.11.4 If correspondence is signed by a firm's electronic signature, ensure that the identity of the person who settled or sent the correspondence can be established.

4.11.5 At the commencement of a matter ensure that the file objectives have been adequately identified, that a plan has been developed to achieve these objectives and that the objectives are regularly reviewed.

4.11.6 If a non-legal practitioner or junior practitioner has the main carriage of a file, provide a system for the regular review of their files. This may, depending on the nature of the matter involve daily, weekly or monthly reviews or a combination of all three.

4.11.7 Ensure that this review process monitors whether the paralegal or junior practitioner is comfortable with the level of responsibility assigned to them and are not left to deal with clients or opposite parties in an unsupervised manner.

4.11.8 Have a system to monitor client feedback.

5.0 Billing Practices and Costs Disclosure

5.1 I do not propose to discuss the issues of billing and costs in a lot of detail. However, I have a few comments in relation to costs agreements that arise from issues identified in files reviewed in recent audits. These comments relate to the objective of ensuring that there is a shared understanding and appropriate documentation on the commencement and termination of a retainer along with appropriate billing practices during the retainer.

5.1.1 Make sure you have a costs agreement if your matter requires it. Don't rely on a rule of thumb that matters of a certain nature will incur costs of under $1,500 and will automatically allow you to rely on the exception in section 263(2)(a) of the Act. Practitioners need to be alert to the matters where costs may exceed $1,500 and disclose that fact to the client as soon as practicable (section 263(3) of the Act).

5.1.2 Don't open multiple files for a client in regard to a single issue in an attempt to avoid the need to provide costs disclosure.

5.1.3 Don't provide an estimate that is so broad as to be meaningless – for example, an estimate of between $8,000 - $80,000.

5.1.4 If you have put a costs agreement in place, make sure you comply with what has been agreed with the client. For example, don't charge GST on your fees when the costs agreement provides that the rates for professional fees are inclusive of GST. Don't inadvertently charge at rates higher than those specified in the costs agreement.

5.1.5 In one instance a firm charged for a non-legal practitioner at $600 per hour (on the basis he had significant commercial experience). This was well in excess of the rate for a senior practitioner nominated in the firm's costs agreement. Even if by signing the costs agreement the client had purportedly agreed to the clerk's charges, the Committee was concerned that the practice was charging for the work of non-legal practitioner at a rate in excess of the rates provided for a senior practitioner on the basis that such charges were likely to be substantially in excess of what was fair and reasonable.

5.1.6 Ensure that when your firm intends to charge for legal work carried out by a clerk or paralegal that the client is made aware of their status and that their work will be performed under the direct supervision of a practitioner and the additional charges that may arise as a result of this supervision.

5.1.7 Changes to costs should be a regular part of conversations with clients and confirmed in writing – to prevent any surprises waiting for them at the end of a matter. Be aware of your ongoing obligations in section 267 of the Act to provide ongoing costs disclosure.

5.1.8 Regularly review and clarify the basis upon which the practice is entitled to charge for legal work. Ensure that the practice's website accurately reflects the determined rates.

5.2 Many practices don't get the best from their billing systems. Even the basic LEAP software has a myriad of functions that make the financial side of practice easier and less stressful. Even if it is just using the alert system that gives a warning when the costs on a file are reaching the limit allowed by an existing costs agreement, it can reduce the stress of end of month billing and the awkward phone call to a client that the costs of their matter has blown out.

6.0 **Communication**

6.1 Many complaints received by the Committee relate to the issue of poor communication in the giving of advice. Poor communication is a common factor in the breakdown of a practitioner/client relationship. A practitioner must take all reasonable and practicable steps to inform their client of the client's rights and possible courses of conduct in relation to any matter in which the practitioner represents the client (Conduct Rule 10(1)) and any significant developments and generally about the progress of the matter (Conduct Rule 10(2)). A practitioner is also required to communicate candidly and in a timely manner with their client (Conduct Rule 8).

6.2 An audit recently identified significant failures to communicate appropriately with the ILP's clients in circumstances where the legal practitioner proceeded on the basis that family law is "*just common sense*" and accordingly asked his clients to complete as much of the work required as they could. The practitioner referred his clients to the Family Court website to complete and file their Family Court forms, rarely checking the forms before they were submitted.

6.3 Unfortunately, this approach resulted in the provision of legal services that fell below the standard expected of a reasonably competent and diligent legal practitioner and provided many examples of poor communication with clients. For example a client (whose first language was not English) was advised in relation to a pending Conciliation Conference to use Google to access the Family Court Conciliation Conference Forms, complete the Forms and file them herself. When the client informed the practitioner that she struggled to complete the Forms the practitioner responded "*While in Western Australia you must obey the law and complete the forms required by the Family Court. The Court will not accept any excuses for you failing to do so.*"

6.4 Professional courtesy is recognised as a fundamental ethical obligation. The notion of "*courtesy*" has a wider application than mere politeness – it is based on the notion of respect for your client, the courts and third parties. It is tied up with the notions of candour, diligence, (including responding to correspondence and returning phone calls), not to engage in unfair tactics (such as unjustified threats) or waste the court's time. Maintaining a high degree of professionalism in communications is vital to discharging a practitioner's obligations to candidly and diligently advise your client and to act in a courteous manner.

6.5 A recent example of professional discourtesy involved a young practitioner who wrote directly to a manager of a company saying that his client was withdrawing a guarantee he had given. The letter lacked clarity and was not precise enough in its terms. A practitioner representing that company manager responded to the junior practitioner (copying in his principal) stating:

"Where did you go to law school? Could you please speak to your firm's principal who will tell you that it is not open for a guarantor to unilaterally revoke or withdraw a guarantee. Please stop issuing such letters as these. I will report you and your firm to the LPB: you are clearly not competent to practice."

6.6 Correspondence containing such uncivilities if brought to judicial attention will be "*noted and condemned*" (*Rinehart & Anor [2015] NSWSC 1201).* During an exchange of correspondence between practitioners as to the correct basis for the analysis of a trust's financial statements, a practitioner wrote "*A cursory examination of the information on which you have chosen to focus would make it clear that your analysis is disingenuous and mischievous. Either you are attempting to provide a misleading interpretation of the facts, or you and your clients do not understand the basis upon which financial statements in Australia are prepared…"* The Supreme Court of New South Wales held that it could not allow such statements to pass without comment, noting that this type of communication not only fell well below the expected standards of courtesy but was an impediment to the resolution of conflicts and in turn could delay or even deny justice.

6.7 Resorting to personal abuse leads to a loss of the objectivity that is necessary for proper legal representation: *Legal Profession Complaints Committee and In de Braekt [2012] WASAT 58.* In this matter a practitioner was struck off for discourtesy that was found to amount to professional misconduct. The relevant conduct included:

6.7.1 Being consistently discourteous and offensive to a Magistrate by making persistent interruptions and repetitive demands on 5 occasions, adopting a belligerent tone and making an entirely unfounded allegation of bias against the Magistrate.

6.7.2 Sending a series of 6 emails over 2 weeks to a police office regarding the delivery of a compact disc which were found to be grossly offensive including calling the police officer a bully and alleging that he was "*making up the law*".

Also threatening the police officer by stating: "*I look forward to cross-examining you, some time the future in a trial*".

6.7.3 Being abusive to a security supervisor at the Central Law Court.

6.8 Practitioners must also avoid acting as a mere mouthpiece for a client – "a practitioner is *not a mere agent and mouthpiece for his client, but a professional exercising independent judgment … and providing independent advice*" *Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352 at [70-71].* A practitioner must always exercise his or her professional critical judgement in the conduct of a client's matter. An area of particular concern is the writing of intemperate letters of demand. The Committee has on a number of occasions reprimanded practitioners for including threats in letters of demand to cause extraneous detriment in order to further their client's interests. 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 section 397 of the *Criminal Code*. 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.

6.9 Another issue arising from poor communication is communication that is lacking in candour. Practitioners must take care to advise their clients in a candid and timely manner. For example, a failure to advise your client that their matter has been moved to the inactive list and the consequential costs of having it reactivated may amount to a lack of candour as well as a breach of your obligations under the applicable Court Rules.

6.10 Issues often arise when a practitioner's file does not contain any written advice about the client's rights and possible courses of action. If the client complains about the lack of advice or of not being in a position to make an informed decision on the conduct of the matter, the practitioner is left relying on having given oral advice or perhaps some file notes of that advice. Although written advice may add to a client's costs, it is ultimately imperative that a practitioner has distilled the client's issues and provided clear advice as to what action may be taken.

6.11 To avoid issues with communication practitioners should ensure that they communicate regularly with their client. Practitioners often become so focused on achieving an outcome that they neglect to keep the clients informed along the way. Even short

periods of delay can amount to unsatisfactory professional conduct. A practitioner was fined for the failure (over a period of 17 days) to immediately notify the clients of orders made in a summary judgment application where interest was accruing and vacant possession of the property was required to be given within 28 days.

6.12 To avoid complaints arising from poor communication practitioners are reminded of the following:

- Be "*honest and courteous in all dealings with clients, other practitioners and other persons involved in a matter*" (Conduct Rule 6(1)(b)).

- Ensure communications are polite and respectful: Edelman J in Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 4] [2014] WASC 282 at [59].

- Don't write to the opposing solicitor telling them they're not competent to practice.

- Don't call your clients "*stupid*".

- Don't describe the other side's client as a "*self absorbed immature person*".

- Don't tell your clients that a certain member of the judiciary "*has a reputation of ripping legal counsel apart*".

- Be careful with telephones – don't make derogatory remarks just as you are hanging up.

- Don't call your clients "*dude*".

- BE CAREFUL WITH EMAILS – treat them like you would letters, ensure they are formal, polite and convey the correct tone.

- If you are instructed not to respond to the other side – inform your client that you have a professional obligation to at least tell the other side of your instructions.

- Don't be afraid to pick up the phone to speak with other practitioners. A frank and open discussion can be far more productive then jumping head first into an endless exchange of letters.

7.0 **Delay**

7.1 A practitioner must perform the work required on behalf of their client diligently and in a timely manner. 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 alternative arrangements can be made, if necessary.

7.2 It is also important particularly for sole practitioners or those in a small practice to remember not to take on matters which you will be too busy to handle, or which because of their size or complexity will be beyond your means to handle in a timely manner.

7.3 The issue of delay can arise surreptitiously and once it arises can be difficult to resolve. For example in a workers' compensation matter two practitioners arranged to meet with the client to take instructions. The senior practitioner fell ill and was unable to meet with the client. Two weeks later the client requested an update as she had not heard from the practitioner. The practitioner contacted his colleague and requested that he suggest a reply to the client. Seven months later the client contacted the firm again and the practitioner requested that his colleague respond. No response was issued. A further seven months later the client contacted the firm again and wrote *"I know that you are both extremely busy, but would appreciate some confirmation that you are receiving my emails.*" The practitioner responded "*All your emails have been received and noted.*" No written instructions or advice had been provided to the client.

7.4 The Committee has, on a number of occasions imposed fines on practitioners for unnecessary delay. Practitioners have been fined for:

7.4.1 failing to act on a client's instructions (for a period of over 2 months) which resulted in a proposed settlement falling through and a notice of default being issued;

7.4.2 failing 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

7.4.3 failing to brief a costs consultant to prepare bills of costs for taxation as instructed (over the course of 14 months).

7.5 In reviewing files during the conduct of ILP audits the Committee will often identify matters involving significant periods of delay. This can range from practitioners simply not meeting a client's expectations as to the timing of a matter to delays that ultimately result in clients' matters not being able to be progressed due to missed deadlines or limitation periods.

7.6 Practitioners should develop and maintain an appropriate management system to monitor progress on all files that is regularly reviewed and updated. All files must be reviewed on a regular and thorough basis to ensure that the competent and diligent delivery and follow up of legal services.

8.0 **File and Conflict management**

8.1 Often the issues of diligence and competence that are identified during an audit arise from poor or insufficient file management.

8.2 Practitioners should develop and implement a management system to ensure that the identity of the client and the nature of the retainer for each matter are accurately recorded.

8.3 Practitioners should endeavour to spend time with the client at the commencement of a matter to explain what they can do (and just as importantly what they cannot do) to assist them with their legal issues. Care should be taken to ensure that instructions are confirmed in writing before the work is undertaken on behalf of a client. Issue arise, for example, where a client sees a practitioner to obtain a quote on the drafting of certain documents, only to be presented 2 weeks later with a set of completed documents and an invoice for several thousand dollars for the cost of drafting them. A short letter confirming these instructions given at the initial meeting could avoid such issues.

8.4 Practitioners should ensure that their firm's procedure manual is tailored to the specific needs of the firm. In particular, ensure that it covers guidelines for staff as to what work is to be undertaken and the protocols for the supervision of work. Ensure it covers the accounting and file opening software, guidelines for conflict checks, references to online legal resources, legal precedents and generally appropriate risk management protocols.

8.5 Practitioners should maintain an appropriate file management system. If both physical and electronic files are to be kept, at least one version must contain a complete copy of the file (although best practice is for both versions to be complete). Ensure physical files are properly ordered and do not contain loose documents or documents from a different file. A recent audit found many faults with the practitioner's file management system including:

8.5.1 The files contained no instruction sheets and no distinction between court documents and correspondence.

8.5.2 Documents and correspondence were not ordered chronologically.

8.5.3 No dates of receipt were recorded for incoming mail.

8.5.4 There was no evidence of copies of sealed or dated court documents being kept on the file and no copies of any draft documents sent to the client for approval were kept on the file.

8.5.5 On a number of files it was recorded that as the firm had "*run out of paper*" correspondence had not been printed out.

8.6 An efficient conflict management system requires an accurate record of the client and the nature of the retainer, for each matter. A practitioner's failure to appreciate that a potential for conflict or an actual conflict has arisen is often caused by the practitioner's failure to properly identify the client at the commencement of a matter.

8.7 A file reviewed during a recent audit showed that the practitioner sought to challenge the terms of a Will claiming that the Will ignored a constructive trust and attempted to improperly dispose of the deceased's home in circumstances where the practitioner had actually prepared the Will on behalf of the deceased 3 years earlier. The dispute over the clause in the original Will resulted in a delay of over 2 years in lodging the probate application. The practitioner did not appear to appreciate the potential conflict in continuing to act when it became clear that the terms of the Will he had prepared were being challenged by his client.

8.8 Another file reviewed showed that the practitioner did not appear to appreciate that his actions in representing three siblings, each claiming an entitlement under a Will, may cause a potential conflict of interest to arise. The clients had not been properly informed of the merits of their claim and their rights under the Inheritance Act and the

practitioner was not properly authorised to bind the clients to a settlement proposal. There was no indication on the file as to which of the siblings had agreed to instruct the practitioner and on what terms. Of concern was the comment on the file from counsel when the practitioner raised the issue of conflict. Counsel appeared to advise the practitioner that the siblings "*appear to be getting on quite amicably at this stage*" and the issue of conflict was not further considered until one sibling later challenged the unequal distribution of the deceased's assets.

9.0 Acceptance of Instructions outside of a practitioner's area of expertise

9.1 Practitioners should have a realistic appreciation of the boundaries of their competence, as well as the amount of work they can reasonably perform. It is difficult for a practitioner to provide quality and effective legal services across a wide range of practice areas. This is especially relevant to those in small or sole practices without colleagues who can assist in times of need. Practitioners must be prepared to accept that there is some work they should not do either by reason of competence or workload and decline to accept instructions in those matters. Audits have shown that ILPs that try and provide every service to every client without a clear focus on the work they can (and want) to do face difficulties with diligence and competence.

9.2 A recent example of a practitioner accepting instructions in a matter that was beyond him by reason of both competency and workload involved a civil litigation dispute in the Supreme Court. The area of practice was unfamiliar to the practitioner. The matter was not handled with the required degree of competency as the practitioner:

9.2.1 Failed to provide adequate costs disclosure to the client in a matter that ultimately involved costs of in excess of $50,000.

9.2.2 Failed to provide any written advice on the merits of the client's claim or the implications and potential costs to the client of being joined as an individual plaintiff in the Supreme Court proceedings in addition to the corporate plaintiff.

9.2.3 Prepared a misconceived application for an interim injunction seeking to prevent the defendant from accessing the plaintiff's records that was dismissed at first instance due to the practitioner's failure to comply with Order 50 Rule 9 of the Supreme Court Rules and resulted in significant costs being awarded against the client.

9.2.4 Failed to prepare and file a statement of claim for a period of in excess of 10 months.

9.2.5 Failed to advise the client as to the implications of placing the corporate plaintiff in voluntary administration so that the costs orders (of in excess of $25,000) ultimately made on the client's discontinuance of the action was made solely against the individual plaintiff.

9.3 Practitioners should work within the specific areas of law promoted by their practice. By doing so they can stay up to date with practice developments and develop good precedents so as to provide high quality work on a consistent basis.

10.0 Conclusion

All practitioners are better placed to meet the constantly increasing demands of legal practice if they have in place clear policies and procedures. Appropriate management systems reduce risks, increase regulatory compliance and facilitate efficiency. Systems should be maintained, reviewed and improved by the practice directors on a regular basis. They are essential to a practitioner providing quality legal services.