ETHICS REVISITED

THE VIEW FROM THE LEGAL PROFESSION COMPLAINTS COMMITTEE

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The purpose of this paper is to:

- Outline the kinds of conduct concerns which have led to disciplinary action by the Committee.
- Make some suggestions as to how they might be avoided; and
- Suggest the best approach to take when dealing with conduct investigations by the Committee.

CONDUCT CONCERNS

Costs

1. Costs related complaints are the largest category of complaints to the Committee. In light of the costs of litigation and the current financial climate, this is expected to continue.

2. The new costs regime under Part 10 of the Legal Profession Act 2008 (the new Act) is very prescriptive and practitioners are urged to familiarise themselves with the relevant provisions to ensure compliance from that date.

3. The case of D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198 at 214 sets out the general principles when assessing whether a practitioner has engaged in excessive or unreasonable overcharging. This involves determining what would in the particular circumstances be a reasonable sum to charge, which involves considering multiple factors, including:
    a. the amount at which the costs in question was or would likely be taxed;
    b. the difficulty of the case;
    c. the novelty or complexity of the legal issues presented;
    d. the experience of the practitioner;

e. the quality of the work;

f. the amount of time spent by the practitioner on the matter;

g. the responsibility involved;

h. the amount or value of the subject matter in issue; and

i. any costs agreement entered into.

4. These what may be called *"D'Alessandro factors"* have been applied in various cases, including fairly recently a decision of the State Administrative Tribunal, Legal Practitioners Complaints Committee v Mijatovic (2007) WASAT 111 (and on appeal Mijatovic v Legal Practitioners Complaints Committee (2008) WASCA 115).

5. *Rule 17.4* of the Professional Conduct Rules of Western Australia reflects these general principles. It provides that:

> *"A practitioner may only charge costs which are no more than is reasonable for the practitioner's services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the practitioner and the client"*.

6. *Section 301* of the new Act sets out the matters a taxing officer must or may consider when conducting an assessment of legal costs (the word "assessment" now replacing "taxation"). These incorporate the D'Alessandro factors. The matters the taxing officer must consider are:

a. Whether or not it was reasonable to carry out the work;

b. Whether or not the work was carried out in a reasonable manner; and

c. The fairness and reasonableness of the amount of legal costs, except to the extent that *Section 302* (costs agreements) or *Section 303* (relevant costs determinations) applies.

In considering what is a fair and reasonable amount the taxing officer may have regard to any or all of the following:

a. Whether the law practice or practitioner acting on its behalf has complied with the Act;

b. Any costs disclosure made to the client under *Division 3*;

c. Any relevant advertisement as to the practice's costs and skills;

d. The skill, labour and responsibility displayed by the legal practitioner responsible for the matter;

e. The retainer and whether the work was done within the scope of the retainer;

f. The complexity, novelty or difficulty or the matter;

g. The quality of the work done;

h. The place where, and circumstances in which, the legal services were provided;

i. The time within which the work was required to be done; and

j. Any other relevant matter.

7. Under Part 13 of the new Act titled "Complaints and Discipline" the classification of conduct which attracts sanction has changed to unsatisfactory professional conduct and professional misconduct (*Sections 402 and 403*).

8. *Section 404* provides that charging excessive legal costs in connection with the practice of law is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

9. Practitioners should be aware of *Section 307* which provides that if, on a costs assessment, the taxing officer considers that the legal costs charged by a legal practice are grossly excessive the taxing officer must refer the matter to the Complaints Committee to consider whether disciplinary action should be taken against the practitioner. Further, if the taxing officer considers that the costs assessment raises any other matter that may amount to unsatisfactory professional conduct or professional misconduct it may refer the matter to the Complaints Committee to consider.

10. The following costs related complaints have led to disciplinary action against practitioners, either by way of the exercise by the Committee of its summary jurisdiction power, or by referral of the matter to the State Administrative Tribunal:

11. Costs disclosure - Failing to provide any costs disclosure to the client at the outset of the retainer; failing to make adequate disclosure.

    The expected standards of conduct by way of appropriate costs disclosure have been set out in *Rule 18* of the Professional Conduct Rules of the Law Society of Western Australia. These are now replaced by the statutory costs disclosure requirements under *Division 3 of Part 10* of the new Act. Note that failure by a law practice to comply with the costs disclosure requirements is capable of constituting unsatisfactory professional conduct or professional misconduct (*Section 268*).

12. Itemised accounts – failing to advise clients of their right to request an itemised account; failing to comply with a request for one; undue delay in providing one; charging a fee for preparing one or advising the client that there is a fee payable; threatening legal action to recover costs in reliance on a lump sum account whilst knowing that the client has requested the practitioner provide an itemised account.

    The requirement to notify the client of the right to an itemised account, and the obligation of practitioners to provide one at no cost and within 21 days of such a request being made, is set out in the new Act (*Sections 260 and 292*).

13. Taxation – Failing to advise a client of the right to request taxation of the account; failing to comply with a client's request to lodge a bill for taxation, undue delay in doing so; issuing proceedings for recovery of costs, or threatening legal action, when the practitioner hasn't complied with the client's request that the bill be itemised or taxed.

Note *Sections 289 and 292* which provide that a law practice must not commence legal proceedings to recover legal costs until at least 30 days after the law practice has given a lump sum bill, or an itemised bill, to a person.

Section 291 provides that a bill must include or be accompanied by a written statement informing the client of the avenues that are open to the client if he/she disputes the bill and any time limits that apply to those avenues, namely:

a. costs assessment under *Division 8*;

b. applying to set aside the costs agreement under *Section 288*; and

c. making a complaint to the Complaints Committee (*under Part 13*).

The new costs assessment regime is set out in Division 8 of Part 10 of the new Act. Note that the client has 12 months from receipt of the bill to request assessment.

14. Undue delay in providing a bill of costs to a client who has requested same.

Under *Section 269* a law practice must give a client, on reasonable request, a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter and must not charge a client for such a report.

15. Rendering a bill which doesn't comply with the relevant costs scale in the absence of a costs agreement permitting the charge outside scale.

16. Rendering a bill which is not in accordance with the terms of the costs agreement entered into between the client and the practitioner.

Costs agreements are dealt with under Division 6 of Part 10 of the new Act.

17. Charging for work which was necessary to perform by reason of the practitioners own neglect or undue delay in the client matter or by reason of the conduct of an employee of the firm.

18. Rendering an account in excess of an agreed fixed fee, then threatening to cease acting if the client didn't agree to pay the additional fee.

19. Charging for legal work which was performed without instructions or after the client terminated the instructions.

20. Ceasing to act for a client without good cause or the clients consent and shortly thereafter improperly rendering an account to the client.

21. Charging interest when not entitled to do so (note *Section 273* of the new Act).

22. Charging a client for attendance at the client's home at which it was alleged the practitioner drank a significant amount of alcohol.

    Being invited to a social function by a client and charging for legal work purportedly performed at the function (LPCC v Mijatovic, supra).

23. Charging fees in great disproportion to the sum in dispute which was the subject of the retainer in circumstances where the practitioner had failed to inform the client that this would be the case.

24. Other matters of concern expressed by the Committee in the costs area have been:

    a. Issuing a bill to a client for barristers fees when the barrister was briefed without the client's informed consent.

    b. Rendering a bill several months or years after the matter in which they acted has concluded.

c. Informing clients at the outset of instructions that they would not be required to pay legal fees until their matter is concluded, but not informing them that they would have to pay for disbursements, nor that these would be substantial.

d. Irrevocable authorities – the Committee's view is that, in circumstances where a client requires access to a file being held pursuant to a solicitor's lien and disputes the amount of the outstanding account, it may raise evidence of possible unsatisfactory conduct for the practitioner to demand, as a precondition to relinquishing his lien over the file, an irrevocable authority to pay the whole of a disputed account. Rather, in such situations the Committee would consider it reasonable for the practitioner to release the complainant's file on an undertaking by the complainant and/or his solicitor to pay the practitioner's costs as taxed.

Avoiding costs complaints

25. Ensure that you comply with the new legislative requirements. The sections referred to above deal with only some of the requirements.

26. Better communication on fees will reduce the potential for complaints about them. Make sure clients fully understand the fee arrangements.

    The Committee is of the view that practitioners should not charge client's legal fees for dealing with administrative matters. This is particularly so in the case of client queries on accounts.

27. Comply promptly with client requests for itemised accounts and assessment/taxation of accounts.

28. Keep clients fully informed of any variation to costs estimates which are provided and explain the reasons for this. Note Section 267 which requires disclosure of any substantial change to anything included in a disclosure already made.

29. Obtain the client's informed consent before you incur large expenses such as briefing counsel.

30. Adequately detail your bill so the client can understand why the bill is in the amount charged.

31. Check the bills before they are sent to the client, to ensure that they not only comply with legislative requirements but are appropriate in all the circumstances. Check for overservicing, duplications of work or other inappropriate charges. Consider whether the time spent was appropriate for the task and whether the work was necessary and within the terms of the retainer.

    In Law Society of New South Wales v Foreman (1994) 34 NSWLR 408 at 422 Kirby P commented that:

    "No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over servicing, excessive time charges and overcharging where it goes beyond the bounds of professional propriety. Time charges have a distinct potential to result in overcharging".

    Note that *Section 290* provides that a bill must be signed on behalf of the law practice by a legal practitioner or an employee of the practice (signing the letter enclosing the bill is sufficient compliance).

32. If there is an error in a bill which is sent out, acknowledge it and rectify it at the earliest opportunity. For example, it may be that a bill is prepared under the misapprehension that the client has entered into a costs agreement.

33. Be open and amenable to concerns expressed by clients in respect of bills rendered by the firm. If the account is properly explained to the client, the client's concerns may well be

addressed. Alternatively, the client may raise a very reasonable complaint in respect of an aspect of the bill which the practitioner might review and, upon consideration, amend the bill.

Neglect or undue delay

34. Practitioners have a professional responsibility to conduct client matters in a timely manner.

Professional Conduct Rule 5.5 provides that:

"A practitioner must try to complete any work on behalf of the client as soon as reasonably possible. If a practitioner receives instructions and it is or becomes apparent to the practitioner that the work cannot be done within a reasonable time, the practitioner must inform the client of this".

35. The Committee investigates several such complaints each year. Such complaints are often accompanied by a complaint that the affected client has tried without success to contact their practitioner. In the most serious cases, investigation into a complaint of neglect or undue delay has led to the discovery that the client has been misled by the practitioner as to the status or conduct of their matter.

36. The Committee has instituted several disciplinary proceedings alleging neglect or undue delay. For example:

- The Legal Practitioners Disciplinary Tribunal found undue delay in dealing with a client's claim for damages for breach of contract, negligence, misleading and deceptive conduct arising out of repairs to the client's truck. The Tribunal found that there were various long and unacceptable delays in bringing on the action which was still not entered for trial when the practitioners retainer was terminated. The Tribunal noted that it was not a straightforward case and the practitioner had difficulty in obtaining evidence to support his client's claim. In the end he could not see how he could progress the case and was inclined to let the matter lapse. The Tribunal noted that the case highlighted difficulties in practice where a practitioner

faced with a complex case does not call in assistance early rather than much, much later.

- Neglect and undue delay in the conduct of litigation on behalf of a company. The practitioner had been engaged to bring an action against various parties for damages for inducing a breach of contract or trust. The Tribunal found the practitioner was suffering from significant personal stress during the period and that matters personal to the practitioner were explanatory of the delay but not exculpatory.

Avoiding neglect or undue delay complaints

37. Don't take on matters beyond your competence. This is not helpful to the client and will inevitably lead to problems for the practitioner and a likely complaint. Professional Conduct Rule 5.7 provides that:

    "A practitioner must not accept instructions which are beyond the practitioner's competence".

    If you delegate a client matter to a more junior employee practitioner, make sure it is not beyond their level of competence and that they are adequately supervised.

38. Ensure that you have an efficient file management system so that there is effective file tracking and checklists to ensure client matters are progressed in a timely way and clients are kept informed of progress.

39. Failing to communicate or inform on progress – it is important that practitioners regularly keep their client informed on progress and return their telephone calls. The Committee receives a number of avoidable complaints from clients who have complained to the Committee because they have not managed to speak to their practitioner or otherwise ascertain the status of their matter because their letters and telephone calls have not been returned.

40. Note *Section 269* of the new Act which provides that a law practice must give a client on reasonable request a written report of the progress of the matter in which the law practice is retained by the client.

41. If you are experiencing difficulty in dealing with a matter, seek assistance at any early time from a principal, fellow partner, fellow employee, or from an outside senior practitioner. Don't leave the matter unattended until the matter is neglected.

42. It is sometimes the case in respect of complaints of this kind that the reason for the neglect or undue delay has been that the practitioner has had concurrent significant personal problems, for example, extreme stress or depression. Everyone experiences difficulties of this kind in their lifetime. It is important that practitioners reach out for help as soon as possible so that the matter can be addressed. If you are feeling overwhelmed and can't manage a client matter(s) inform a senior practitioner in the practice, or outside the practice if this isn't possible, so that steps can be taken to assist you and the clients at the practice.

43. The worst thing that you can do is to mislead the client in respect of the conduct of their matter. It is sometimes the case that a practitioner who has neglected or unduly delayed a client matter will, rather than face this down with the client, mislead the client as to the position in respect of their matter. Concealment and deceit will only aggravate the situation and can have far direr consequences than the initial conduct issue of neglect or undue delay. If you find yourself falling into this situation, it is vital that you seek assistance at the very earliest opportunity.

44. It is suggested that principals be alert to conduct by employee practitioners which may indicate that the practitioner is depressed and may require support and assistance, and that their files may require review to ascertain whether there are any problems with client matters which require urgent attention.

Misleading conduct

45. There is little that needs to be said about this conduct, which is inconsistent with the standards of honesty and ethical behaviour which is expected of legal practitioners. A few examples of conduct which falls into this category and which has led to disciplinary proceedings are:

    a. Misleading the court – omitting information eg: not advising the court of a previous relevant court order; misstating the true facts or making misrepresentative statements orally or in pleadings.

    b. Misleading the client – misleading as to whether an offer of settlement has been made by the other party; withholding from a client an offer of settlement so that it could be reframed to increase the legal costs component; misleading as to the status of the clients matter.

    c. Misleading the other party to proceedings – written communications with another practitioner in which representations were made which were, to the practitioners knowledge, misleading.

    d. Misleading the Complaints Committee - as to whether itemised accounts had been prepared and sent to a complainant/client;

    e. Misleading the Board - as to whether the practitioner was practising law whilst uncertificated.

46. It is trite to say that misleading conduct is incompatible with professional practice. It is suggested that practitioners exercise the greatest care in formulating pleadings and affidavits, and in communications with other parties, to ensure that there is no misleading conduct, either deliberate or inadvertent. If you have misled, rectify the misapprehension that has been created by informing the relevant party of the correct situation at the earliest opportunity.

Discourtesy

47. The Committee has issued several proceedings over the years against practitioners arising from gross discourtesy to the court, to fellow practitioners, to clients or to the Committee. This has included:

- Discourteous oral submissions to a Judge; writing a discourteous letter to a Judge. Professional Conduct Rule 14.4(1) provides that counsel must at all times act with due courtesy to the court before which counsel is appearing.
- Using threatening and oppressive language in a letter to another practitioner; sending letters to a third party (a review officer appointed to deal with the client's claim for workers compensation) which contained strong criticisms, serious allegations and dismissive descriptions in mocking or ironic language in respect of the other parties solicitors.

  Practitioners are reminded of Professional Conduct Rule 20.1 which provides that:

  "A practitioner must treat professional colleagues with the utmost courtesy and fairness".
- Speaking of a complainant in offensive terms and using coarse language in so doing.

Avoiding gross discourtesy complaints

48. Stress can lead to inappropriate behaviour of this kind. If you have erred in this regard apologise to the recipient at the earliest opportunity. Invoke the 24 hour rule if tempted to fire off a grossly discourteous letter.

Some other ethical issues

49. <u>Pleading fraud</u> – a practitioner was found guilty of unprofessional conduct in pleading fraudulent misrepresentation when he did not have clear and sufficient evidence to support such an allegation. Practitioners are reminded of Professional Conduct Rule 14.8 which provides that:

"A practitioner instructed to prepare or settle a pleading must not make any allegation unsupported by the instructions given to the practitioner and, in particular, must not allege fraud unless:

1. *The practitioner has specific instructions to plead fraud; and*
2. *The practitioner has credible material which establishes an apparent case of fraud"*.

50. Improper threats – practitioners are cautioned about making improper threats to fellow practitioners or opposing parties, in correspondence or otherwise. For example, it is unsatisfactory conduct for a practitioner acting for a plaintiff in an action to submit a proposed settlement to the other party on the basis that, if it is not accepted, then certain matters will be referred to a taxation authority.

51. Use of discovered documents – practitioners are reminded that when they receive documents as a result of inspecting discovered documents, they are bound by an implied undertaking to use the documents not for any collateral or ulterior purpose but only in furtherance and for the purposes of the action in which they are disclosed. This undertaking is binding on anyone into whose hands the documents fall in the knowledge that they were obtained by discovery.

52. Obligation to give adequate discovery – a practitioner has been found guilty of unprofessional conduct for failing to give adequate discovery to the defendant in an action in the District Court of WA.

53. Complaints against fellow practitioners - If you consider that a fellow practitioner has acted unethically it is suggested that, if appropriate to do so, you politely inform that practitioner of your concern and give him/her the opportunity to reconsider the conduct and correct it.

DEALING WITH THE COMMITTEE

54. If you receive a letter from the Complaints Committee, under no circumstances place it in the bottom drawer of your desk under last years diary. No one enjoys receiving a complaint or other correspondence from the Committee. However, ignoring the correspondence will not assist the situation and may well make the situation worse. It is sometimes the case that the Committee finds nothing in a complaint but ends up commencing disciplinary proceedings against a practitioner because the practitioner has failed to respond.

55. If you receive a complaint and find yourself unable to respond, seek the assistance of a professional colleague in answering the complaint, for example, a member of the Senior Advisers Panel of the Law Society or another legal professional association. It is suggested that you also seek the advice of another practitioner if you are unsure how best to respond and/or the matter raises a serious conduct issue.

56. Practitioners are reminded that they have a professional duty to respond to enquiries by the Committee in a conscientious and timely manner. The State Administrative Tribunal has commented on this duty, saying that:

> *"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 members professional conduct, then it must be satisfied that practitioners respond in a timely manner, produce any documents requested, and otherwise give full cooperation to any enquiry into their conduct by the Committee".* (Legal Practitioners Complaints Committee v Richardson (2006) WASAT 251 at pp65).

57. Provide a full and frank response and take care to ensure that the response does not mislead the Committee in any way.

58. If you need further time to respond, contact the relevant investigating legal officer at the Committee's office to arrange this.

59. Be courteous. The Committee recognises that dealing with a complaint or conduct investigation is stressful. However, dealing with complaints and other ethical concerns referred by the Committee are part of your professional obligations. Writing threatening or grossly discourteous letters to the Committee is counterproductive and may well result in disciplinary proceedings which were completely avoidable.

60. Bear in mind that the Committee will wish to copy your response to the complainant so ensure that any reference to the complainant is appropriate and does not unnecessarily aggravate matters.

Stress and depression

61. Practitioners will be aware that law is classified as one of the most stressful of occupations. The pressures of practice combined with personal problems can quite understandably lead to a depressive illness or practitioners feeling overwhelmed by stress. Practitioners who experience this should seek assistance at the earliest opportunity rather than let the matter worsen. The Law Society has a Law Care Program and there are many members of the profession, for example, those on the Senior Advisers Panel, who can be contacted for assistance. Not to deal with this can lead to complaints from disaffected clients which will only exacerbate health problems.

Incapacity

62. If you are a sole practitioner and for any reason unable to conduct your legal practice inform the Legal Practice Board so that steps can be taken to arrange for the appointment of a supervising solicitor to the practice. It may be that you can arrange for someone to take over your practice during the period of your incapacity – if so, discuss the proposed arrangement with the Board. Contact the Board at the earliest opportunity to avoid potential complaints from the clients of the practice in respect of the conduct of their matters.