A POSITIVE APPROACH TO COMPLAINTS

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The purpose of this paper is to highlight:

- Professional obligations in respect of complaints;
- The best approach to take to complaints; and
- Reducing cause for complaint.

1. I received a book from a former staff member titled *"A complaint is a gift – using customer feedback as a strategic tool".* I don't propose to strain credibility by suggesting that you treat receipt of a complaint from the Committee as a gift. However, I think you will agree that there can be some positives from a complaint. In a narrow sense, the complaint is an opportunity to review the conduct of a particular client matter to see whether there are aspects of it which could perhaps have been performed better. In a broader sense, it may indicate that there are aspects of the management of your practice or the conduct of your legal work which should be reviewed.

2. There is another plus from adopting a positive approach to complaints: you are less likely to procrastinate in responding to it and will, when necessary, sensibly seek some independent advice from a senior legal practitioner in respect of it.

3. If you accept that receipt of the occasional complaint is a likely part of professional practice you may even have in place a procedure to ensure that they are properly dealt with in order to give the best outcome possible, for all parties.

Professional obligations in respect of complaints

4. Practitioners will be aware that the relevant legislation is the Legal Profession Act 2008 ("the Act"). The Legal Profession Complaints Committee ("the Committee") is

established as a regulatory authority under Part 16 of the Act which provides that its functions are to supervise the conduct of legal practitioners, enquire into complaints and other conduct concerns and, where appropriate, institute disciplinary proceedings against practitioners. Part 13 of the Act sets out the complaints procedure – who can make complaints, against whom, and how they are to be dealt with by the Committee.

5. Practitioners have a duty to respond to enquiries from the Committee in a conscientious and timely manner. The State Administrative Tribunal ("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 member's professional conduct, then it must be satisfied that practitioners respond in a timely manner, produce any documents requested, and otherwise give full co-operation into any enquiry into their conduct by the Committee"*. [1]

The best approach to take to complaints

Answer the complaint fully and frankly

6. Provide a full and frank response. If a mistake or difficulty has arisen, it is far better to be open and cooperative with the Committee. Take care to ensure that your response does not mislead the Committee in any way.

7. In a recent decision by the Tribunal a practitioner was found guilty of unsatisfactory professional conduct by giving a response to the Committee that was deliberately misleading and designed to avoid giving a complete explanation at that time.

8. In this case the practitioner had advised a client that he could carry out building projects despite being unregistered as a builder, and prior to the grant of a stay of a decision and orders of the District Court in an appeal against the client's deregistration. The Committee contended that the practitioner thereby encouraged

[1] LPCC and Richardson (2006) WASAT 251 at p65

his client to breach Section 4 of the Builders Registration Act 1939. The Committee further contended that upon being asked to provide a response to the complaint in relation to that conduct the practitioner gave a deliberately misleading response. He advised the Committee that the circumstances relating to the complaint against him had been referred to the Corruption and Crime Commission, when in fact no such complaint had been made. The practitioner did not subsequently rectify that misstatement.

9. The Tribunal found the practitioner guilty of professional misconduct, by encouraging his client to breach Section 4 of the Builders Registration Act, and suspended his practising certificate for three months. In relation to his deliberately misleading response to the Committee, which the Tribunal found was designed to avoid giving a complete explanation at that time, his practising certificate was suspended for a period of two months, to run concurrently with the three months suspension. He was also ordered to pay the Committee's costs.

10. In its decision the Tribunal stated that *"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"*.[2]

11. In another case, delivered in May 2009, the Tribunal stated *"The intentional misleading of a registration authority might usually be expected to attract a penalty not less severe than suspension of a practice certificate"*.[3]

12. In another recent matter, the Committee alleged that a practitioner engaged in unsatisfactory professional conduct when in the course of acting for a client in a civil action he failed to apply for a springing order in accordance with the client's instructions, request and obtain an opinion from counsel as instructed, respond properly or at all to five of the client's emails and to progress the action in any significant way. Secondly, the Committee alleged professional misconduct in that on 23 February 2007, having been asked by the Committee to provide his response to a complaint made against him by the client in relation to the action, he

[2] LPCC and M L Segler (2009) WASAT 205(S) at p5
[3] LPCC and P J Sorenson (2009) WASAT 104 at p10

attempted to mislead the Committee by providing information which was false and which he knew was false, namely that by letter of instruction dated 19 October 2005 he had sought counsel's advice in relation to the client's claim for trespass and that he had received that advice in February 2006. The practitioner was suspended from practice for two months in respect of the matters. The practitioner admitted the allegations and consented to the penalty. [4]

Respond in a timely manner

13. Under the Act, the Committee is required to notify practitioners of complaints and of their right to make submissions in respect of them. When referring the complaint to the practitioner, the Committee will usually request the practitioner respond to the substance of the complaint and will nominate a time for responding, for example, 21 days. Don't ignore the correspondence hoping it will go away. If you require some further time to respond, for example, to obtain some advice in the matter, don't hesitate to contact the relevant legal officer at the Committee's office and request further time to respond. There is usually no difficulty with this.

14. Failing to respond may amount to unsatisfactory professional conduct.

15. In November 2009 a practitioner admitted unsatisfactory professional conduct in that from 15 January 2009 to the present the practitioner failed to respond to correspondence from the Committee dated 15 January 2009, 30 March 2009, 12 May 2009 and 17 July 2009. The practitioner was fined $8,000. The practitioner gave an undertaking to the Tribunal to in future respond to correspondence from the Committee in a timely manner. [5]

Conduct investigations

16. The Committee can also conduct investigations into matters of its own volition, in the absence of a complaint being received. These enquiries arise as a result of a possible conduct concern coming to the attention of the Law Complaints Officer or

[4] LPCC and P T Williams VR56 of 2009 Orders made 29 July 2009
[5] LPCC and M L Bennett VR167 of 2009 Orders made 4 November 2009

a member of the Committee. The Committee can investigate such matters under Section 421 of the Act if the Committee has reasonable cause to suspect that the practitioner has been guilty of unsatisfactory professional conduct or professional misconduct. Such an investigation will involve seeking information from the practitioner. The comments above in relation to candour and timeliness apply, of course, to these matters also.

Summonses

17. The investigation of a complaint will often involve looking at a practitioner's client file or other practice records. The Committee will either write to the practitioner requesting records or issue a summons for them. The latter is a fairly routine practice, and aimed at getting to the bottom of a complaint and concluding enquiries as quickly and efficiently as practicable. The Committee has wide powers of investigation under Part 15 of the Act: it can obtain files or other documents from practitioners or third parties, examine practice records, examine on oath the practitioner or other persons involved in the practitioners affairs, or require the practitioner to provide written information verified by statutory declaration. If you receive such a summons it is important that you comply – there are penalties for not doing so. [6]

Seek advice

18. We are all aware of the saying that a practitioner who represents himself/herself has a fool for a client. There are two scenarios where it is particularly important that a practitioner seek independent legal advice in respect of a complaint:

    a. If the complaint involves a very serious allegation or
    b. If a practitioner freezes on a matter. Practitioners who find it difficult to respond are urged to seek the assistance of a professional colleague in answering the complaint, for example a member of the Senior Advisers Panel at the Law Society or another legal professional association, or another senior member of the profession known to the practitioner.

[6] Section 520 Legal Profession Act 2008

Complaint handling procedure

19. Large firms will have established procedures within the firm so that complaints are handled appropriately. It is suggested that small practices, including sole practitioners, also set in place a procedure so that complaints are dealt with appropriately and in a timely manner. This may include arranging for a fellow practitioner to act for you in respect of a complaint received from the Committee.

20. Such a procedure should address not only complaints referred by the Committee but also complaints made by clients directly to the firm. Setting up such a procedure may well prevent a complaint ultimately being made to the Committee. The procedure may involve appointing one partner to handle client concerns and advising all clients of the name of the person to whom they can refer their concerns. Staff members of the firm could be encouraged to advise that partner of any matters of complaint raised in correspondence to the firm, or in telephone calls from clients, so that they can be addressed with the client.

Telephone calls from the Committee

21. The Committee's office receives about 1400 new telephone enquiries or visits each year. Each enquiry is dealt with by a legal officer. If at all possible, and where appropriate, the legal officer will try to informally resolve the matter by speaking to the practitioner concerned, or facilitating contact between the practitioner and the caller. If the latter, the legal officer may suggest to the caller that they contact their practitioner to discuss the matter and inform the practitioner that the Committee's office has suggested this to them. Practitioners are requested to be receptive to such calls. It is an opportunity to try to sort the matter out without a formal complaint being made, and if this can be done at this stage it will save you time and costs later in responding to a complaint.

22. The fact that the client has resorted to contacting the Committee may mean that you do not have a complaint handling system which the client could use or was aware existed. Even if that is not the case, it does not mean that there has been a breakdown in the solicitor/client relationship, rather it may be that the client just

needed to speak to someone about their matter of concern to get a better understanding of whether they had a valid complaint.

Reducing cause for complaint

23. The number of practitioners complained about has varied little over the last three years and represents a relatively small percentage of the practising profession – some 7.6% of the profession was the subject of a complaint during the 08//09 reporting year, compared to 6.85% in 07/08 year and 8.25% in 06/07 year. [7]

24. The Legal Practice Board ("the Board") has reported that there were 4,673 certificated or deemed certificated practitioners practising in WA during the 08/09 financial year. During that same period, 263 practitioners were the subject of one complaint, 77 practitioners were the subject of two complaints, and 16 practitioners were the subject of three or more complaints.

25. If you have received more than one complaint during the year, you are strongly urged to carefully review those complaints and the conduct of your practice in light of them. It may well be appropriate to seek some advice in relation to the management of your practice.

26. There are some types of work which will attract more complaints than others. The area of law which usually attracts most complaints is family law – some 23% of complaints received during the last financial year were in this area, followed by civil litigation (22%) and criminal law (9%).

27. A significant number of complaints are from the other party to proceedings in which a practitioner acts for a party – in the last reporting year some 23% of complaints were from the other party to proceedings, and 56% were from clients or former clients.

28. Sole practitioners continue to be the largest category of practitioners complained of (28%) followed by practitioners in incorporated practice (26%). It is understood that

[7] LPCC Annual Report pg 16

this latter figure includes those sole practitioners who have moved to an incorporated structure. [8]

29. If you are a sole practitioner, it is suggested that it is particularly important to establish some professional relationships with practitioners in a like situation with whom you can discuss professional concerns. It is understood that the Law Society has formed a Sole Practitioner's Committee which is aimed at assisting sole practitioners.

30. It is sometimes forgotten that there is, usually, a power imbalance in the solicitor/client relationship – the client is unversed in legal matters and very dependant on the advice and expertise of his or her legal practitioner. Rule 5.1.2 of the draft Legal Profession Rules reflect this: it provides that a practitioner must *"treat the client fairly and in good faith, giving due regard to the client's position of dependence, the practitioners special training and experience and the high degree of trust the client is entitled to place in the practitioner"*. [9]

What kinds of matters attract the most complaints?

31. Many complaints, of course, raise more than one area of complaint. During the last reporting period costs continued to attract the most complaints followed by, in order, failing to communicate or inform on the progress of a matter, delay, failing to carry out instructions, misleading conduct, discourtesy and neglect. [10]

How might the complaints be avoided?

Costs

32. Explain fully and frankly to your client the costs you will be charging in respect of a matter. Practitioners in the past have not been good at communicating in respect of

[8] LPCC Annual Report 2008/2009 pg 15
[9] Draft Legal Profession Rules – refer to Legal Practice Board website www.lpbwa.org.au
[10] LPCC Annual Report 2008/2009 pg15

costs matters. Many complaints could have been avoided if practitioners had fully explained their charges to the client.

33. Ensure that you comply with Part 10 of the Act which deals with costs disclosure and assessment. A breach of the requirements under this Part may amount to unsatisfactory professional conduct or professional misconduct.

34. Be receptive and courteous to enquiries from clients about costs, for example, requests for an explanation in respect of items on accounts they have received. Don't charge the client for the time spent answering the enquiry. Review the enquiry or complaint to see if there may be merit in it.

35. Don't bill blindly by 6 minute units without carefully checking that the accounts sent out under this arrangement are reasonable and proper. Consider whether the work was reasonably done, whether there was duplication, whether the costs are proportionate and reasonable in all the circumstances. Bear in mind the matters a taxing officer is required to consider under Section 301 of the Act when conducting an assessment of legal costs:

    a. whether it was reasonable to carry out the work;
    b. whether the work was carried out in a reasonable manner; and
    c. the fairness and reasonableness of the amount, taking into account any costs agreement or costs determination.

Section 301(2) sets out the matters a taxing officer can have regard to when considering what is fair and reasonable.

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."

Failing to communicate or inform on progress

36. This kind of complaint falls into the highly avoidable category. Many complainants have contacted my office because their telephone calls or letters to their practitioner have gone unanswered.

37. If you haven't already done so, ensure that you have a system established so that communications with the client are not overlooked.

38. On occasions a client who has unsuccessfully tried to contact his/her practitioner will contact my office for assistance. If you receive a call from my office about this, take the opportunity to resolve the matter by contacting the client and trying to address their concerns.

39. Establish a call up system so that the client is regularly updated on the progress of their matter.

Neglect/Delay

40. What amounts to neglect or undue delay will depend on the particular facts, for example, whether there are court deadlines for taking action on a matter. Failing to carry out instructions can also fall into these categories.

41. Establish a bring up system and other procedures so that matters are not overlooked. The system should include a record of all critical dates and how those dates will be monitored and complied with. Any such system should take into account staff absences so that critical dates are not overlooked by reason of a staff member being absent from the office.

42. Don't take on a matter that is beyond your competence. It is appropriate to advise a prospective client that you are unable to accept instructions because the matter is not within your area of expertise. It is unethical to take a matter on which is beyond your competence, it is also a recipe for a complaint to my office. Rule 5.1 of the draft Rules imposes positive obligations on practitioners to *"perform the work required on behalf of a client diligently; not accept an instruction which is beyond*

the practitioner's competence; not accept an instruction if the practitioner is not in a position to carry out and complete the instruction diligently".

43. Various proceedings have been commenced against practitioners over the last year alleging undue delay or neglect:

- A practitioner was found guilty of unsatisfactory conduct by undue delay in the course of acting for a client in a workers compensation claim in carrying out work he had agreed to do. The practitioner was fined $2,500. [11]

- A practitioner was found guilty of unsatisfactory conduct by undue delay or neglect over a period of about six months by failing to carry out instructions to prepare a draft minute of amended statement of claim, alternatively a minute of substituted statement of claim in a Supreme Court action. The practitioner was reprimanded. [12]

- A practitioner was found guilty of unsatisfactory professional conduct by failing to fully comply with Supreme Court orders between about 31 May 2006 and 24 August 2006 resulting in the client's claim being dismissed and judgment being entered against the client in the counterclaim. The practitioner was fined $4,000. [13]

- A practitioner was found guilty of unsatisfactory professional conduct by undue delay between about April 2006 and February 2007 in progressing the finalisation of an estate. The practitioner was fined $2,500. [14]

- A practitioner was found guilty of unsatisfactory professional conduct by undue delay over a 12 month period in pursuing the recovery of monies claimed by the client from another party. The practitioner was fined $3,000. [15]

[11] LPCC and M J Lourey VR31 of 2009 Orders made 2 April 2009
[12] LPCC and T H Offer VR215 of 2008 Orders made 6 March 2009
[13] LPCC and M L Bennett VR167 of 2009 Orders made 4 November 2009
[14] LPCC and B D Havilah VR65 of 2009 Orders made 12 June 2009
[15] LPCC and P G Giudice VR198 of 2009 Orders made on 4 March 2010

- A practitioner was found guilty of unsatisfactory professional conduct by:
    a. Wrongly withholding funds received from a settlement of a personal injuries matter for a client, on account of unbilled costs arising from a criminal matter. The practitioner was fined $5,000.
    b. Failing to pursue the assessment and payment of costs on behalf of the client pursuant to a costs order made. The practitioner was fined $2,000.
    c. Failing to provide a trust statement over a 17 month period. The practitioner was fined $2,000.
    d. Failing to respond to the client's telephone calls and correspondence in relation to enquiries concerning personal injuries settlement funds between about November 2007 and February 2008. The practitioner was fined $1,500. [16]

- The Committee also exercised its summary conclusion powers in respect of some complaints of neglect or undue delay during the last reporting period. [17]

Misleading Conduct

44. Misleading the client. Regrettably, a complaint of neglect or undue delay may develop, on occasion, into a complaint of misleading conduct as well. A practitioner who has neglected or unduly delayed a client matter may make matters far worse by misleading the client as to the status of the matter. If practitioners are not able to manage a matter, for whatever reason, it is imperative that they inform the client of this and facilitate the transfer of the file to a new practitioner. If the neglect or undue delay, or misleading conduct, has arisen as a result of personal circumstances (physical illness or depression), it is essential to seek medical and professional assistance at the earliest opportunity so that these matters can be addressed. The Law Society arranges confidential counselling through its Law Care program.

45. Misleading the Court. Rule 31 of the draft Legal Profession Rules provides, inter alia, that *"A practitioner must not knowingly make a misleading statement to a*

[16] LPCC and P G Giudice VR202 of 2009 Orders made 4 March 2010
[17] LPCC Annual Report 2008/2009 pages 20 - 25

court" and that *"A practitioner must correct a misleading statement as soon as possible after the practitioner becomes aware that the statement was misleading'."* If you have erred in this way, rectify the matter at the earliest opportunity. If in doubt as to the correct course to take, seek the advice of a senior legal practitioner as soon as possible.

46. The Tribunal has considered a few matters over the last year which raised such issues:

- A practitioner was found guilty of unsatisfactory conduct by unprofessional conduct by:
    a. Preparing and swearing an affidavit without exercising sufficient care which by reason of what was omitted from it, was misleading and thus had the potential to mislead the court.
    b. Rendering accounts to a client for work performed in circumstances where he should have known that it was not proper to do so and his firm was responsible for incurring the costs by reason of its failure to act in a timely manner on the client's instructions.

  The practitioner was fined $6,000. [18]

- The Committee alleged that a practitioner was guilty of unsatisfactory conduct by unprofessional conduct by intentionally or recklessly misleading the Supreme Court of WA by swearing an affidavit and subsequently making oral submissions in proceedings before the Master of the Court that were knowingly or recklessly misleading. The Tribunal found that in swearing the affidavit and in making the oral submissions the practitioner intentionally conveyed a misleading impression to the Court that his client had, without prior arrangement, paid a sum of money to the firm where the practitioner was employed, rather than to another law firm. The Tribunal therefore found that the practitioner swore the affidavit and made the oral submissions with the intention of misleading. The practitioner was suspended from practice for three months. Leave to Appeal was subsequently refused. [19]

[18] LPCC and B D Havilah VR208 of 2008 Orders made 20 February 2009
[19] LPCC and W Vogt (2009) WASAT 125 p3

Discourtesy

47. Rule 3.1.2 of the draft Legal Profession Rules requires practitioners to *"be honest, candid and courteous in all dealings with clients, other legal practitioners and third parties"*. This includes, of course, the obligation of courtesy towards the court. This is another category of complaints which are largely avoidable.

48. The practice of law is often stressful and tempers fray. It is suggested that practitioners factor this reality into the way they conduct their practice by:

- Invoking the 24 hour rule if a letter or email has been drafted which may be perceived as discourteous.
- Not getting involved in any personal antagonism between the client and the other party, by expressing discourteous remarks to the other party or being a party to your client doing so – your client is looking to you for dispassionate wisdom and counsel.

49. The Committee is concerned about complaints of this kind and it is not uncommon for it to express concern to a practitioner in respect of such conduct, or request that a practitioner write a letter of apology. In appropriate cases, it will commence disciplinary proceedings against a practitioner for gross discourtesy.

50. Practitioners are also cautioned against writing to third parties in a threatening way. A practitioner was recently found guilty of unsatisfactory conduct by unprofessional conduct in sending a letter containing threats and inappropriate and intimidating demands to an agent of a Mr D who was a defendant in proceedings brought, in his personal capacity, by the practitioner and his wife. The letter, on the practitioner's letterhead, was addressed to a real estate agent concerning the outcome of proceedings in the Magistrate's Court which had been completed the previous day. The practitioner had been a party to those proceedings and had represented himself in them. The letter demanded payment of the judgment in favour of the practitioner and his wife and threatened that unless payment was made on the following day, an enforcement writ would be issued and further costs incurred. That demand was made, notwithstanding that the Magistrate's order did not require payment until seven days after the judgement. The letter also threatened that, subject to some further enquiries by the practitioner, he proposed personally to refer the matter to the Director of Public Prosecutions with a recommendation that

the landlord, Mr D, be indicted for perjury. The Tribunal determined that *"the unjustified threat, to take enforcement proceedings before the payment was due, amounted to unprofessional conduct …. It considered that the threat of criminal complaint was completely without foundation and could only be viewed as an attempt to intimidate and cause distress to Mr D*". The practitioner was reprimanded and fined $2,500. [20]

Establishing appropriate management systems to reduce complaints

51. Some encouraging research has been conducted by the Office of the Legal Services Commissioner in NSW (OLSC) which indicates that establishing appropriate management systems reduces complaints.

52. Under Section 140 of the Legal Profession Act 2004 in NSW, legal practitioner directors of incorporated legal practices (ILPs) are required to ensure that appropriate management systems are implemented and maintained to ensure that the provision of legal services by the practice comply with the requirements of the Act (this is similar to Section 105 of the WA Act). The NSW legislation doesn't define *"appropriate management systems"*. The OLSC has adopted an *"education towards compliance"* strategy by establishing on its website ten areas which ILPs are required to address to demonstrate compliance with *"appropriate management systems"*.

53. The Legal Services Commissioner, Mr Steve Marks has reported the following in his most recent Annual Report:

> *"The OLSC was involved this year in a research study with Dr Christine Parker of the University of Melbourne to assess whether the ethical framework for ILPs, the self-assessment process, has been effective and whether the process is leading to improved conduct by ILPs as evidenced by the number of complaints made against firms that have become incorporated.*
>
> *As has been discussed in previous Annual Reports, legislation in 2001 was introduced in NSW permitting legal practices to incorporate. On incorporation the legislation required that an ILP must implement and maintain 'appropriate management systems'. Ten key areas or objectives have been identified as determinative of the appropriateness of management systems. The ten*

[20] LPCC and M L Segler 2009 WASAT 91 at p3 and 91(S)

objectives are intended to help ILPs systematise and entrench professional ethical conduct. ILPs use these ten objectives to conduct a self-assessment of their management systems and rate themselves on a form provided by the OLSC.

The study looked at 620 self-assessment forms and tested whether ILPs that have self-assessed their own implementation of management systems do in fact manage themselves better and have better behaviour than before they self-assessed as indicated by lower complaints rates. The results revealed that on average the complaint rate (average number of complaints per practitioner per year) for each ILP ***after*** *self-assessment was well under one third of the complaint rate* ***before*** *self-assessment. This is a huge drop in complaints".*

54. I recommend practitioners visit the OLSC website and view the self assessment system for appropriate management systems on it. It is a practical tool which can be applied to any legal practice.

55. I have reported in the Committee's last Annual Report that I understand that the Board will adopt a similar online self assessment process to that which exists in NSW and Queensland, which it will incorporate into its new website. This initiative is strongly supported.

23 March 2010