THE OFFICE OF THE
LEGAL SERVICES
COMMISSIONER

'MINIMISING COMPLAINTS AND MAXIMISING YOUR ETHICAL STANDARDS'

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LexisNexis

The Office of the Legal Services Commissioner (the OLSC) is an independent body that receives complaints about solicitors and barristers. The *Legal Profession Act* 2004 ("the Act") is the legislation which establishes the OLSC to function and governs the operation of the system of complaints against legal practitioners in NSW. The OLSC acts as a co-regulator of the legal profession with the New South Wales Law Society and the Bar Association of New South Wales. The OLSC's ultimate objective is to reduce the number of complaints made about legal practitioners.

OVERVIEW OF COMPLAINT TRENDS TO THE OLSC

In 2009-2010 the OLSC received 2,661 complaints about legal practitioners. Of the 2,661 written complaints received, 1,812 were assessed as consumer disputes and 849 were assessed as investigations. We received 8,708 calls from the public on our Inquiry Line. The most common types of complaints we receive relate to costs, communication and undertakings.

BILLING – OVERCHARGING

In 2009-2010, costs complaints comprised of 22.4% of all the written complaints received at the OLSC. Of these complaints overcharging continues to be the most complained about issue in relation to costs. This has been the case for many years now. It is important to remember however that the actual number of complaints about costs are much higher as costs often appear as an additional complaint to a substantive complaint. There are a number of reasons why this is so:

- the continued use of hourly billing as the preferred method of billing, a widespread use of fixed fee arrangements in matters where such an arrangement may not be appropriate (e.g criminal matters);
- a lack of use of such arrangements in routine matters where it may be appropriate (e.g mortgage transactions, leases);
- the practise of charging more than one client in simultaneous matters is also contributing to the problem;
- recent decisions on matters relating to overcharging by the Administrative Decisions Tribunal and the NSW Court of Appeal;
- a requirement that practitioners only provide ongoing costs reports where there is a substantial increase in costs;
- no requirement in the Queensland or NSW legislation that a practitioner render a bill at any other time other than at the completion of a matter.

Many of the complaints, by and large, concern proportionality. The amount charged by practitioners should be in proportion to the amount rewarded. Often however it is

not. Costs charged that are not in proportion to the award lead to unhappy clients and complaints.

CASE STUDIES

(1) We recently received a complaint about a bill forwarded to a client for $41,400. The complainant alleged that the bill was excessive and there were a number of fabricated charges in the bill. The OLSC examined the bill and found multiple instances of double charging, conferences that didn't occur and letters that were not written. These discrepancies were put to the practitioner and the bill was ultimately reduced by 30% to $29,400.

(2) A client was charged $200 for copying a 100-page document and another client was billed for 27 hours work in a single day by a single practitioner.

(3) A complainant alleged that a practitioner had overcharged and over-serviced on six occasions, including charging clients amounts above the Family Court scale contrary to his written costs agreement with the client. In one instance he had charged $463.72 for a disbursement, which was in fact $63.72.

The practitioner had also charged one client $27,603.50 for a matter where the itemized bill, for example, showed charges of $750 for typing a three page document, $40 for receiving a telephone message to return a call, and $250 for attending a fifteen minute conference with the client. The hourly rate charged by the practitioner was $250 per hour. We spoke to the practitioner and he agreed to amend the bill accordingly.

ROBUST COMMUNICATION

In 2009-2010, the OLSC received 407 written complaints and 1,428 calls to our inquiry line regarding communication. Allegations raised in these complaints included practitioners being rude and discourteous, practitioners failing to return telephone calls, practitioners failing to advise on issues, failing to respond to letters and failing to explain issues.

There has been a steady increase in the number of written complaints in relation to communication since 2004. This is of great concern to the OLSC and the profession generally. As a learned profession, we have an obligation to be courteous in our communications with each other and with our clients.

CASE STUDIES

(1) We recently dealt with a complaint about a practitioner that had, in an email, written to the opposing practitioner and made a number of highly derogatory personal comments about the character of that practitioner. The legal practitioner wrote as follows:

> "Madam,
>
> You have lived on the periphery of reality for so long that you really think it possible that you can construct an explanation for your actions.
>
> As the client what he thinks of you.
> Ask his carers what they think of you.
> Ask the practitioners what they think of you, the one who wouldn't act as our agent even though they were asked repeatedly. All refused.
>
> Quite sad to think that you are so desperate, lonely and irrelevant (but I think mostly lonely) that you feel the need to write to me as if I cared what your sordid grubby mind thinks.
>
> Really you should examine the motives for your behaviour towards others. If you are as unhappy as I think you are, seek help. Retire – do something that makes your life meaningful. Certainly it is obvious that you are in such reduced circumstances spiritually that you are bereft of an entire suite of admirable personality traits. Go to church or something.
>
> Do us all a favour – if you can't be kind and gentle, compassionate and friendly to all of those you work with instead of carrying on with the histrionics as you do, why don't you dry up you twisted old hag and blow away?
>
> Ring me if you need to talk. I can help put you straight."

The practitioner who sent this email said that he had not intended to hurt the opposing practitioner but had wanted to personally offer her help in order for her to be happy. We determined that the practitioner's conduct was offensive and discourteous and amounted to a breach of Rule 25 of the *Revised Practice and Conduct Rules*. The practitioner was cautioned.

(2) We received a complaint about a legal practitioner who grabbed hold of the opposing practitioner's jacket in court and called him a "f'ing prick" and a "little smartarse." Proceedings were instituted in The Administrative Decisions Tribunal. The Tribunal was asked to determine, inter alia, whether the legal practitioner's conduct constituted unsatisfactory professional conduct and if so, what orders were appropriate. The Tribunal held that the legal practitioner's conduct involved a departure from standards of responsibility expected of a practitioner toward a fellow practitioner and therefore constituted unsatisfactory professional misconduct. The legal practitioner was publicly reprimanded.

UNDERTAKINGS

An undertaking is a promise made by a solicitor upon which the recipient is entitled to rely and depending on the circumstances, which binds the solicitor or solicitor's client or both. Undertakings are obligations that lawyers pledge themselves or their clients to honor.

The use of undertakings is common amongst legal practitioners. Undertakings are used for example, to facilitate the transfer of files from one practitioner to another or where third party service providers are engaged on behalf of a client. Undertakings are also used by legal practitioners before the Courts. Although a useful mechanism to ensure action or inaction, undertakings can be subject to misuse. Failure to comply with an undertaking can lead to an array of consequences. Breach of an undertaking or failure to fulfill an undertaking to a court can constitute contempt of court. Breach of an undertaking or failure to fulfill an undertaking can constitute a breach of contract. Lastly, breach of an undertaking or failure to fulfill an undertaking can amount to unsatisfactory professional conduct or professional misconduct.

CASE STUDIES

(1) A legal practitioner undertook to the OLSC to give 'highest priority' to responding to correspondence from the Commissioner. He in fact delayed over eleven months, despite receiving five reminder letters, to reply as required to a particular letter. The OLSC instituted proceedings against the legal practitioner for the legal practitioner's

failure to respond to the correspondence. The Administrative Decisions Tribunal found that the legal practitioner's conduct amounted to unsatisfactory professional conduct. The Tribunal ordered that the legal practitioner be reprimanded and that he pay a fine of $1,000. The Tribunal noted at his apparent failure to acknowledge at any time that he had been in breach of his undertaking. It also referred, at to the circumstances in which he had previously been reprimanded for failure to comply with an undertaking to send a file to a solicitor.

<u>**ASSESSING THE NEXUS BETWEEN COMPLAINTS AND ETHICAL STANDARDS**</u>

As legal practitioners we have two main ethical duties – a duty to the court and a duty to the client. These duties have, by and large, remained constant over time. The duty to the court is the primary ethical duty and stands over and above any other ethical duties. (*Giannarelli v Wraith* (1988) 165 CLR 543) Inherent in our duty to the court is a duty to the community through high ethical standards and duty to uphold the law. This is a duty owed to society as a whole.

The duty to the court stipulates that as officers of the court, we must act in a certain way. We must not only obey the law but must also ensure the efficient and proper administration of justice (*Myers v Elman* [1940] AC 282). This duty also stipulates that, as officers of the court, we have an obligation to seek to improve the law and the administration of justice. These duties, which are enshrined in conduct rules and have been reinforced by the courts, provide that we must not mislead the court (*New South Wales Bar Association v Thomas [No. 2*] (1989) 18 NSWLR 193.) and that we must act with competence, honesty and courtesy towards other legal practitioners, parties and witnesses (*New South Wales Bar Association v Livesey* [1982] 2 NSWLR 231.) The duty to the court also requires that we are independent (free from personal bias), frank in our responses and disclosures to the Court and diligent in our observance of undertakings given to the court or our opponents.

The second ethical duty is a duty to the client. This duty is said to arise because it places us in a fiduciary relationship with our client. In this relationship the client places complete confidence and trust in his/her fiduciary - us. As legal practitioners we stand in a fiduciary relationship to our clients, as agents and as providers of legal

advice. These being so we are all subject to certain duties arising out of this fiduciary relationship. (*Hospital Products Limited v United States Surgical Corp* (1984) 156 CLR 4). As a fiduciary, we must not place ourself in a position where our own interests conflicts with that of our client's, the beneficiary. As a fiduciary, we must not profit from our position at the expense of our client, the beneficiary. As a fiduciary, we owe undivided loyalty to our client, the beneficiary, not to place ourself in a position where our duty towards our client conflicts with a duty that we owe to another client. A consequence of this duty is that we must make available to our client all the information that is relevant to our client's affairs. Lastly, as a fiduciary, we must only use information obtained in confidence from our client, the beneficiary, for the benefit of our client and we must not use the information for our own advantage, or for the benefit of any other person.

In addition to the above fiduciary duties legal practitioners also have an ethical obligation to their client and to society to act morally. This obligation requires a legal practitioner to question whether their actions are right or wrong. This obligation goes beyond the practice rules. It involves legal practitioners taking into consideration and weighing a number of factors in acting for their client. The obligation involves legal practitioners, for example, considering the impact of their actions on justice, the integrity of the legal system and the impact of their decisions on the preservation of relationships. On a practical level this may involve engaging in far more moral counselling with clients and being responsible for the consequences of one's actions. The concept of moral counselling means:

> "..discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on 'the people', in the same matter-of-fact and (one hopes) un-moralistic manner that one discusses the financial aspects of a representation. It may involve considerable negotiation about what will and won't be done in the course of a representation; it may eventuate in a lawyer's accepting a case only on condition that it takes a certain shape, or threatening to withdraw from a case if a client insists on pursuing a project that the lawyer finds unworthy. Crucially, moral activism envisages the possibility that it is the lawyer rather than the client who will eventually modify her moral stance..."[1]

Moral activism would thus involve a legal practitioner taking into consideration and weighing a number of factors and not just relying on role morality – the professional

[1] D. Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY, Princeton University Press, Princeton, 1988 at 173-4.

rules. Moral activism envisages the kind of ethical advice Abraham Lincoln gave to one of his clients when he advised them as follows:

> "Yes, we can doubtless gain your case for you; we can set a whole neighbourhood at loggerheads; we can distress a widow less mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly energetic man; we would advise you to try your hand at making six hundred dollars another way."[2]

The following discussion illustrates the application of these obligations in relation to common complaints.

BILLING - OVERCHARGING

As stated above the majority of complaints about billing relate to the concept of proportionality. Most clients believe (or are led to believe) that the amount they will be charged will be in proportion to the amount rewarded. Unfortunately, as stated above, this is often not the case.

One of the main reasons why the concept of proportionality is not being applied effectively in our view is because the concept as interpreted by the legislation is limited. In NSW, for example, there is only one piece of legislation that positively stipulates proportionality. Sections 339 of the *Legal Profession Act 2004* provides for maximum fees of $10,000 in personal injuries cases where the claim is for an amount less than $100,000 and where there is no costs agreement in place. There is however no limitation of costs in NSW for awards greater than $100,000.

There is also the problem that in NSW there are no charging limits in most matters. Since the deregulation of costs in NSW in 1994 there are very few areas where scales of costs or ceilings of costs are imposed. This can potentially result in complaints if the practitioner fails to notify their client of significant increases. The greatest problem however is the ideology behind billing practices, not the rules/legislation or lack thereof.

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[2] Id at 174.

Under the costs disclosure system clients are given a document, which sets out an estimate of costs that may be charged at the conclusion of their matter. Clients will more often than not take that estimate to be more like a fixed quote rather than just an estimate. So when the case is completed and the client is handed a bill that is significantly different to the original amount outrage and a complaint will often follow. The practitioner is not however entirely to blame.

Practitioners are not obliged and have not necessarily adopted the practise of explaining to the client that the amount given is just an estimate, nor are practitioners obliged to explain to the client that that estimate may increase as the matter proceeds. Furthermore, practitioners are less likely to inform a client about any changes to the original estimate because the estimate is just that, it is not a fixed quote. In the cases where practitioners do provide regular billing, practitioners also appear to have adopted a practice of not notifying the client of specific costs increases believing that the bills are self-explanatory.

The ethical obligation of legal practitioners to their client and society requires the practise of explanation and information. Engaging in this type of discussion is a necessary part of the practitioner client/relation and one which performed effectively can assist practitioners in being the subject of a complaint.

ROBUST COMMUNICATION

In New South Wales the obligation of courtesy is found in Rule 25 of the *New South Wales Revised Professional Conduct and Practice Rules (Practice Rules) 1995*. Rule 25, based upon the Law Council of Australia Model Rule[3], states as follows:

> "A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct."

In addition to the Conduct Rules, practitioners in New South Wales have a statutory obligation under clause 175 of the *Legal Profession Regulation 2005* to refrain from discriminatory or harassing behaviour.

[3] www.lawcouncil.asn.au/policy/1957352449.html

Despite these ethical and legal obligations, a number of legal practitioners appear to hold the view that civility is anachronistic or incompatible with today's commercial realities. This sentiment stems from the notion that law is a business, which calls for the same ruthless competitiveness, as does the commercial world. Robust communication - refusing to return phone calls, refusing to consent to routine extensions of deadlines, refusing to shake hands in the courtroom, using hostile language to correspond with opposing parties and other vulgar behaviour such as name-calling, shouting, temper tantrums and occasionally physical assault - is thus seen as being compatible with success.[4] We are aware of legal practitioners behaving in this manner.

We are not surprised that this kind of "hired gun" behaviour is common today. In the commercial and profit-driven space in which lawyers operate, it is common for lawyers to feel obliged to effect to the every will and instruction of their client and "win" at all costs. But 'business' is not a 'profession' and the commercial world has no duty to the court or to the administration of justice. We however do have a duty to the court and the administration of justice.

Remember that we are part of a noble profession. As members of a profession, we have both an ethical and statutory obligation to ensure that we do not engage in conduct that diminishes public confidence in the administration of justice or is prejudicial to the administration of justice. "Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law."[5] At all times we need to act in accordance with the highest standards of ethical and practice conduct. We need to understand that in addition to being legal practitioners we too are ordinary citizens in society and whilst we do owe a fidelity to our client, we also owe a duty to society to be respectable and moral persons.

So, taking on board the obligation to engage in moral activism, if you have a problem with a fellow practitioner, a morally active approach would suggest that the best

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[4] See Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10. Geo. J. Legal Ethics (1997) 367, 379.
[5] Statement of Rule 1-16, *New South Wales Revised Professional Conduct and Practice Rules (Practice Rules) 1995*

course of action is to attempt to resolve the problem through effective and honest communication. If you have received a nasty email from an opposing practitioner, address that email and its contents directly by raising it with the practitioner who sent the email. Similarly, if you have been subjected to a tirade of abuse by a fellow practitioner in an open forum about your competence, refrain from responding in a similar manner and instead address that behaviour in a more suitable forum. Contact the practitioner at his/her office and discuss the behaviour after the fact.

UNDERTAKINGS

In New South Wales there are two specific conduct rules in relation to undertakings. Rule 26 of the *Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules)* provides that a practitioner who communicates with another party in the conduct of legal practice in terms which expressly, or by implication constitute an undertaking on the part of the practitioner "must honor the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time". This conduct rule relates to undertakings between fellow practitioners.

Rule 33 of the *Solicitors' Rules* further provides that "a legal practitioner who in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honor the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time". This conduct rule is different to Rule 26 in that it relates to undertakings between legal practitioners and third parties.

The breach of an undertaking given by a legal practitioner who in the course of his/her practice is regarded by the courts, regulators and the profession as a very serious matter. This is because the concept of an undertaking represents the essence of professionalism and fitness to practice. As Wylie J in *Countrywide Banking Corporation Ltd v Kingston [1990] 1 NZLR 629* commented:

"...to excuse the defendant from performance would...seriously undermine the justifiable claims of the legal profession to standards of integrity and honourable conduct in which both the profession and the public have constantly to rely." (at 640.)

RULES VERSUS VALUES

According to Professor Michael J. Kelly legal ethics is not just a system of laws applicable to the dilemmas faced by lawyers, legal ethics is -

> *"....rather a search for practical judgment or wisdom which attempts to achieve some coherence among conflicting values and principles and concerns, together with awareness of the particular circumstances and a sense of the applicable range of shared experience, beliefs, relations and expectations. Legal ethics also takes into account moral sentiment – those attitudes, reactions, and feelings which not only affect our actions, but the way lawyers evaluate, justify, and explain conduct and relate to people."*[6]

Legal practitioners need to consider their role as a professional within the contect of the role as an ordinary citizen in society. This consideration involves looking at the concepts of "role morality" and "ordinary morality." "Role morality" is defined as a set of norms that apply to us in the various social roles we occupy in life such as a parent or a lawyer. In the case of the legal profession, these norms are the regulatory framework within which a lawyer practices. These roles are narrower than the norms of "ordinary morality", which apply universally.

Role morality can often force a legal practitioner in making a decision to only consider his/her client's needs and ignore universal moral standards. David Luban calls this "partisanship". When a legal practitioner ignores ordinary morals s/he gives little or no weight to the possible harmful consequences of the client's action on the opposite party or to third parties or to the public generally. As a consequence of this requirement, lawyers do not engage in "the moral imagination" and therefore are unable to see the effects of their actions and are unable to be sympathetic and put themselves in other people's shoes and imagine the predicaments of others.

This limitation can prevent the lawyer from questioning whether their actions are right or wrong. Good ethical practice thus does not just involve lawyers being aware of

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[6] Professor Michael J. Kelly, LEGAL ETHICS AND LEGAL EDUCATION, Hastings-on-Hudson, N.Y. : Hastings Center, Institute of Society, Ethics and the Life Sciences, (1980) at 46.

and deferring to the practice rules. Good ethical practice comes from morally reflective decision-making, that is, a consideration of both professional and ordinary morals.

NATIONAL PROFESSION REFORMS

The legal profession in Australia is about to undergo unforseen changes that will have significant effects on the way we practice law. Some time in the next 24 months, we will find ourselves practicing under a different set of Rules and Regulations. This new legislation will see the introduction of outcomes-based regulation with a specific focus on professional responsibilities. Under the draft National Laws, as they presently stand, all legal practitioners will have enhanced professional responsibilities. These enhanced professional responsibilities are found in the definition of "professional obligations" in Part 1.2 of the National Laws. According to the National Laws "professional obligations" include:

(a) Duties to the Supreme Courts; and
(b) Obligations in connection with conflicts of interest; and
(c) Duties to clients, including disclosure; and
(d) Ethical standards required to be observed by the practitioner;

The enhancement is found in (d) which specifically refers to "ethical standards." The effect of including this provision, will most likely mean that legal practitioners will not only be subject to the traditional practice and conduct rules but will also be subject to a higher standard over and above the traditional rules as moral activists and ordinary citizens.

The structure of the proposed draft National Laws and Regulation, through the extension of ethical duties, will mean a greater focus on ethical concepts and behaviour rather than on the proscriptive rules we have become accustomed to. This will no doubt have positive impact on all facets of legal practice. It will enable us to better understand the exact nature of our role in society and understand that we must not practice law within a "role morality" vacuum.