Professional courtesy: not so common

By Josephine Stone, LSNT Complaints Investigations Officer

What is it and when does it apply? It is not generally defined as it is applied in the legal professional sense but is nonetheless required of all practitioners, to clients, other practitioners, the Courts and the community at large.

To be 'courteous' is to be polite, considerate or respectful in manner or action. Such conduct serves many purposes and goes beyond mere good manners. It is a mark of a "professional", one who holds himself/herself out as highly trained and competent in his/her chosen discipline. It demonstrates the skill, artistry, demeanour or standard of conduct appropriate in a member of the profession.

It oils the progress of contentious matters and disputes in which a practitioner has been engaged to resolve.

It saves time and money. Discourtesy is often a factor in negligence allegations and complaint matters eg failure to respond to client's queries, failure to follow instructions, failure to follow up with the opposing party.

More importantly, it is the mark of someone in whom one has confidence in reposing one's trust. This may take many forms but simplistically it is the belief by the client, one's colleagues and the Courts that the practitioner will behave in an appropriate manner and "do the right thing".

To other practitioners

Section 44(1)(c) of the Legal Practitioner Act provides that a legal practitioner must act with honesty, fairness and courtesy in all dealings with other legal practitioners in a manner conducive to advancing the public interest.

Professional Conduct Rule 18 requires that " 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 conduct".

There are three concepts that immediately stand out. The first is that the requirement of courtesy is aligned with the concepts of honesty and fairness.

The second is that it is also aligned with the integrity and repute of the profession as a whole.

The third is the protection of the public interest.

Honesty and fairness could be seen as components of courtesy. The explanation given in dictionaries for the three words in many instances overlap: plausible, reasonable, civil, honest dealing, fair play, justice, veritable etc.

Courtesy requires the practitioner to "play fair" when dealing with other practitioners. This does not mean that a practitioner cannot be a tough opponent but it does require certain behavioural standards.

The practitioner should not allow the bitterness of any dispute conducted on behalf of a client to reflect in his own behaviour such as to result in acrimonious or offensive correspondence. In extreme cases a campaign of offensive correspondence can result in a practitioner being disciplined, even struck off.

What is "offensive" depends on the circumstances of each case. It may range from the use of an inappropriate word or phrase in correspondence which of itself seems inoffensive but in the context of the letter or dispute may take on quite a different and unpleasant flavour, to an outright exchange of barely veiled insults outside the door of the court.

It may consist of statements which, to the maker, are no more than "gilding the lily" or optimistically putting the client's best foot forward but which to the reader are blatant untruths.

It bodes well to remind ourselves that the dispute between the opposing parties is just that, between those parties. A legal practitioner is engaged to conduct the interests of one's client with diligence and efficiency: Professional Conduct Rule 10A. An integral part of this quality of service is the civility with which a practitioner conducts him or herself. Using emotive laden language in correspondence or in person to another practitioner serves neither the client's interests nor that of the profession.

The second and third concepts can be classified under the notion of "professional responsibility" ie the roles and responsibilities of the legal profession and its members in the provision of legal services. A legal practitioner's essential responsibility is to make successful the service of the law to the community: Zeims v Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279 at 298.

To the client

Interestingly, neither section 44 of the LPA nor the Professional Conduct Rules use the word "courteous" in the context of

Professional courtesy: not so common cont...

solicitor/client relationships. The terms "honestly and fairly" and "in the best interests of the client" are frequently used but the term "courteous" is glaringly absent.

Nonetheless, I doubt any one could argue against the proposition that a practitioner has the same professional responsibility of courtesy to the client.

The Law Society receives many complaints from complainants that the practitioner engaged on their behalf has been arrogant, rude, spoken to them in a demeaning way or otherwise been discourteous. Such complaints are dealt with on their merits and determined on the particular facts. However, as a rule of thumb, personal comments are always best avoided. Some noteworthy examples in recent complaints are:

1. "Do not call me as your call would most certainly not be welcome...you are the most paranoid, pathetic client I have ever encountered...";
2. "I suggest you get a life, as I now understand why the offender in your matter would have felt compelled to slot you";
3. "I otherwise confirm the settlement amount exceeded your expectations... for which you have expressed all the gratitude of a mangy dog with the heart the size of a split pea, with a grub in it"; and
4. "Why do you want your settlement monies paid to you (instead of Trust), you'll only spend it on drugs".

As Horace opined "once sent out, a word takes wing beyond recall", particularly when it is committed to print.

Clients come in many shapes and sizes; all clients come to you with a problem, not always resolvable by strict application of law. Many clients resent the costs associated with fixing the problem and the fact that they need a lawyer at all. Whatever assistance the client requires, and in whatever shape they present, the client is entitled to a professional service from someone who is holding themselves out as a professional, and who is paid to deliver that service.

To the Court

Section 44 requires the practitioner to act with honesty and candour in all dealings with courts and tribunals.

Professional Conduct Rules 11 to 17 deal with the practitioners duties to the Court and again, whilst the term "courteous" is not used, its meaning is inherent in the requirements of integrity, candour, frankness and the honesty with which the practitioner is obliged to conduct him or herself.

The practitioner's professional responsibility to the court takes precedence over the responsibility to the client.

Of particular relevance to this discussion on courtesy is the requirement that a practitioner must not knowingly make a misleading statement to a court on any matter.

The temptation to "gild the client's lily" before the court, or maybe just avoid responsibility for one's own default, may lead a practitioner to "stretch the truth". Recently, a practitioner has accused a fellow practitioner of advising the court that she had "only just received instructions in the matter" when in fact she had received instructions

continued page 8...

Professional courtesy: not so common

cont...

some four months previously. A matter of semantics?

The system of justice cannot survive if practitioners do not maintain their obligations to the courts.

I am unaware of what obligations the courts have to practitioners. Perhaps a reader could enlighten me?

To third parties

Again, section 44 requires a practitioner to "conduct dealings with members of the community and the affairs of others that affect the interests of others with honesty, fairness and courtesy and in a manner conducive to advancing the public interest".

The Rules of Professional Conduct and Practice are a little more specific. Rules 24 to 27. Of particular interest in the complaints area are Rules 24 (contracting for services) and 26 (misleading or threatening statements made to third parties), both of which have arisen in complaints I have dealt with over the last 12 months.

Conclusion

It all appears to depend on one's communication skills. It is not simply a matter of knowing the law and how to apply it. It is not even what one says but how one says it. It really is a matter of successfully conveying one's meaning to others and, hopefully, persuading them to one's own point of view.

Communication is after all what we lawyers are supposed be good at, isn't it? Well, isn't it?

Invitation to participate in a review of the Evidence Act

cont...

debate, the ALRC maintains an open inquiry policy. As submissions provide important evidence to the inquiry, it is common for the ALRC to quote them or refer to them in publications. However, the ALRC also accepts submissions made in confidence.

Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material).

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential. As part of the open inquiry policy, non-confidential submissions are made available to any person or organisation upon specific request.

A request for access to a confidential submission is determined in accordance with the federal Freedom of Information Act 1982, which has provisions designed to protect sensitive information given in confidence.

Participation in the inquiry

Although the ALRC is based in Sydney, it will be conducting consultations around Australia during the inquiry. If you would the ALRC to meet with you or your organisation to discuss issues relevant to the inquiry, please contact the ALRC. This will help us to plan our meeting schedules.

To be placed on the mailing list for this inquiry and receive free copies of consultation papers for this inquiry, please contact the ALRC: GPO Box 3708, Sydney NSW 2001, Tel: (02) 8238 6333, Fax (02) 8238 6363, Email: evidence@alrc.gov.au.

Risk seminars

Marsh Pty Ltd has arranged for Le Messurier Harrington to conduct two risk management seminars in October. One will be specifically targeting litigation lawyers and will be of relevance to solicitors and administrative staff.

The other seminar will be an introduction to sound risk and practice management as part of a two part series, with the second session being conducted early next year. This session will provide an introduction to risk and practice management, explore issues of claims, complaints and client satisfaction and consideration of engagement issues. Whilst this is appropriate for partners, solicitors and administrative staff, we particularly recommend that firms consider attendance for any newly qualified solicitor, articled clerks, paralegals, administrative staff or solicitors new to your firm.

Sessions will be held in late October at the LSNT in Darwin. More details are available from the Law Society Secretariat.

Administrative law essay prize

The Australian Institute of Administrative Law Inc is inviting entries for the 2005 AIAL Essay Prize in Administrative Law. The length of the essay is 8-10,000 words. The amount of the prize is $2,000. Entries must be submitted by 1 March 2005.

Further details may be obtained by contacting:

Emeritus Professor Dennis Pearce
Faculty of Law
Australian National University
Canberra ACT 0200
Email:
dennis.pearce@anu.edu.au