professional ethics

A practitioner's duty to an unrepresented opponent

By Josephine Stone, Complaints Investigations Officer for the Law Society NT

Recently, the Society has received a number of complaints from unrepresented litigants, mostly in Family Law disputes, alleging that the opposing solicitor has failed to observe professional standards in their communications. What are those professional standards?

Practitioners should be aware of Professional Conduct Rules 17.35 to 17.42 which deal with a practitioner's duty to an opponent and Rule 26 which deals with communications to third parties. All practitioners would be aware that a practitioner must not deal directly with the client's opposing party unless the practitioner has first established the opponent is unrepresented and consents to such dealings. The difficulties arise out of the opponent's perceptions of the role of the practitioner in these situations.

Some recent complaint examples are:

1. The opponent considered the practitioner's letter of demand unprofessional and "threatening" because it stated that unless agreement could be reached the practitioner would have to refer the matter to the court;
2. The opponent and the practitioner could not agree on reasonable photocopying costs, the opponent taking this to mean that the practitioner was refusing to pay for the photocopying she had requested on discovery;
3. The opponent and practitioner could not agree on the meaning of a clause in a court order resulting in the suspension of the opponent's scheduled access with his children, and necessitating his application to the court for variation.

In each of the cases outlined above there was a perception on the part of the opponent that the practitioner owed a duty of care to the opponent or that the practitioner's statements went beyond a mere difference in interpretation, that they were uttered with mala fides and were a deliberate attempt to take advantage of the opponent's unrepresented state.

It is well established that a legal practitioner owes a duty of care to his/her own client. No such duty is owed to the opposing party.

> "....when a solicitor is performing his duties to his client, he will generally owe no duty of care to third parties...Nor as a general rule does a solicitor acting for a party in adversarial litigation owe a duty of care to the party's opponent..."
> White v Jones (1995) 1 All ER 691 at 698, per Lord Goff.

There are few exceptions. One such exception is in the area of negligent mis-statement where a duty may be owed to a third party if all the following requirements are met:

1. If specific or general advice is required for a purpose disclosed to the advisor, and
2. The advisor knows that the advice will be communicated to a third party for that purpose, and
3. The advisor knows the third party will act upon that advice without further independent inquiry, and
4. The advice is then acted upon by the third party to his detriment, and
5. The advice was negligent:
   Hedley Byrne & Co Ltd v Heller & Partners (1964) AC 456, Edwards v Lee NLJR 1516.

The work of a family lawyer, whether contentious or non-contentious, is adversarial. It is the duty of the practitioner to safeguard and advance the interests of his own client and that state of affairs is inconsistent with any suggestion that a duty of care is owed to opposing parties: per Cordery on Solicitors at J159. The exceptions are rare eg: costs thrown away where the defaulting solicitor has a liability to the opposing client (pursuant to an order of the court) or in criminal proceedings the prosecutor may be subject to a duty of care to the accused in certain circumstances. Such exceptions are based on a primary duty to the Court.

When you think about this it all makes sense. A practitioner who owes a duty of care to his client and the opposing party has a conflict of interest. After all, he cannot serve two masters. He cannot protect his client's interests and that of the person with whom the client is in conflict. All the opponent can ask of the opposing party's practitioner is that the practitioner does not deliberately mislead them by false statements: see Rules 17.35, 17.40 and 17.42.

It may be clear to the practitioner to which party he or she owes loyalty but how do you get this message across to the unrepresented opponent? Some practitioners refuse to communicate with the opponent by telephone, preferring the relative safety of written communications. However, it isn't always possible or feasible to avoid telephone communications.

The following are suggested tips in dealing with unrepresented litigants:

1. State from the outset, in writing, that your duty is to your client, not the opponent;
2. Recommend the opponent seek legal advice. Most Legal Aid Commissions will provide free clinic or telephone advice;

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the criticisms detailed by Mr Lasry. Lending his support to the military commission proceedings, Mr Ruddock said the process was necessary to protect classified information.

This assertion was promptly dismissed by Law Council President Stephen Southwood QC.

"Courts and court martials in the United States are experienced in dealing with security sensitive information and have adequate procedures in place, including the use of secure versions of documents and in-camera hearings. There is nothing to suggest a military commission process would provide a superior means of protecting security sensitive information," Mr Southwood said.

He said the Australian Government's inaction over the matter was unprecedented when compared with other nations.

"Great Britain, along with other allies of the US, have demonstrated their commitment to their citizens by securing the release of a number of detainees from prosecution under the military commission process."

And just recently, Pakistan secured the release of 34 of its nationals from Guantanamo Bay.

Just as damning, Mr Southwood added, was the fact that the Australian Government had still not produced any report of its own on the preliminary hearing and had not provided any evidence to challenge Mr Lasry's conclusions about the unfairness of the system.

Mr Ruddock insists that the Government's priority is to ensure that allegations against Hicks – and fellow Australian Guantanamo Bay inmate Mamdouh Habib – are tested in a fair and transparent process.

If that's the case, why dismiss such a scathing report from by an independent expert without bias or pre-conception? Surely it warrants closer examination.

Hicks and Habib – regardless of their guilt or innocence – are Australian citizens and deserve better. ①

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3. Use non-threatening language eg "it is our position that the court order means... and if you disagree with our position you should seek legal advice from your own solicitor", rather than "the court order means this... and I'll take you to court if you don't comply";
4. Take heed of Rule 17.40 which requires cognisance of the opponent's unrepresented state in court matters; and
5. Make a file note of every telephone or personal communication with the opponent. It may even be prudent in certain cases to send a copy of the file note to the opponent. The initial cost to you or your client may save you considerable time and expense later on.①

Crime Victims Advisory Committee

The Department of Justice, on behalf of the Crime Victims Advisory Committee, is currently seeking a legal practitioner to become a member of the Committee.

The Committee is established under the *Crime Victims Advisory Committee Act*. The functions of the Committee are to:

(a) advise the Attorney-General on matters affecting the interests of victims of crime;

(b) investigate, report and make recommendations to the Attorney-General on matters referred to it by the Attorney-General;

(c) disseminate information relating to matters affecting the interests of victims of crime; and

(d) be a forum for the co-ordination of organizations involved in, and initiatives in, the delivery of services to victims of crime, including, but not limited to, services by the Territory.

The Committee is made up of 11 members including a Chairman appointed by the Attorney-General, four Chief Executive Officers of relevant Government Departments or their nominees, and six other members appointed by the Attorney-General. The legislation requires that one member shall be a legal practitioner who is not employed by the Commonwealth or the Territory.

The Department is seeking expressions of interest from legal practitioners who would like to be considered for appointment as a member of the Committee.

Written expression of interest, including a curriculum vitae should be sent to:
Crime Victims Advisory Committee
Department of Justice
GPO BOX 1722
DARWIN NT 0801

Meetings are held approximately four times a year and are usually held in a meeting room at the Department of Justice, 45 Mitchell Street. They commence at 7:30am and end no later than 9am. Members are entitled to a sitting fee of $30 an hour. There may also be additional time spent as part of a sub-committee examining a particular issue relating to victims.

For further information, please contact Zoe Marcham on 8999 6742.①