

Professional Standards

Avoiding Complaints, Common Complaints, Rules of Professional Conduct and Practice, and the Disciplinary Tribunal

I recently presented this as a CPD in Alice Springs. I think it is also timely to reproduce it in *Balance*.

My role as Professional Standards Solicitor (PSS) is to investigate complaints as well as conduct of practitioners that the Society is made aware of through various sources. In the latter instance this becomes an investigation of the Society's own motion. In my role as PSS I only make recommendations. Contrary to the view of some members of the profession as well as the public, I do not make any decisions as to whether a complaint should be either dismissed or upheld nor does any other investigator delegated with such powers under s 491 of the Legal Profession have such powers.

Once the complaint or conduct is investigated the recommendations are put into a detailed report which is then put before non-conflicted members of the Ethics Committee for discussion. In some instances one of the non-conflicted members of the Ethics Committee may take over the investigation and draft a report for consideration by the Ethics Committee.

Neither does the Ethics Committee have any decision making powers. In the event that the EC considers that the complaint should be dismissed, then whilst the EC cannot dismiss a complaint the Society can delegate its decision making powers pursuant to s 647 of

the LPA "to the Council or an employee of the Society". The CEO, Mrs Bradshaw, has the delegation pursuant to s 641 to dismiss complaints and she is the only employee of the Society having such delegation. After the EC has considered the complaint and if it is of the view that the complaint should be dismissed, then the CEO considers the recommendations of the Ethics Committee, whilst she is not necessarily required to do so, and she can dismiss complaints. However, the power of upholding complaints and imposing penalties vests in the Council.

The following are some recurring themes being contained in referrals from the Courts or in complaints.

1. Making of in Court Statements and drafting Affidavits

There have of recent times been an increase in respect of statements made in Court and drafting of affidavits. One of these matters has been heard by the Tribunal and at the time of writing this article the decision has not been received by the Tribunal. There are another three of these cases still under investigation so I will not go into too much detail about any of these four matters. I would, however, like to discuss a recent decision of the Disciplinary Tribunal (i.e. October 2008) in relation to a Legal Practitioner, Ian Rowbottam (IR). At this point I would like to state that



Jacqueline Presbury,
Law Society Professional Standards
and Ethics Solicitor
pa2pss@lawsocnt.asn.au

under the Legal Profession Act Disciplinary action against a practitioner must be published and hearings in the Tribunal are open to the public unless there are special circumstances. The decision is on the Law Society website. I also want to mention that as this investigation was commenced under the Legal Practitioners Act *repealed* (the old Act), it was also determined by the Society to lay charges under the *repealed Act*, although, under the transitional provisions of the Legal Profession Act (the new Act) it was heard by the Legal Practitioners Disciplinary Tribunal which is the successor to the Legal Practitioners Complaints Committee.

Under the *repealed Act* the Society could only commence disciplinary proceedings with the approval of the Attorney General. Therefore, in this case the Society was obliged to obtain and did obtain the consent

PROFESSIONAL STANDARDS AND ETHICS

of the Attorney General to commence proceedings before the Disciplinary Tribunal.

For your information, this process is not necessary under the Legal Profession Act, with the Society having power to commence proceedings in its own right with the proviso these must be commenced within 6 months of the decision to bring charges, although, extension can be sought under s 516 by way of written application. Matters considered in respect of such application is whether it is in the public interest, whether there is any prejudice to the practitioner with respect to evidence no longer available because of the delay and the reasonableness of the explanation for delay.

It is not intended to go through *Rowbottam's* case in detail. I am going to make some brief references to the decision for the purpose of demonstrating breaches primarily of the misleading statements made in Court and the swearing of affidavit material which were determined in this case to be professional misconduct.

In summary, the practitioner had made submissions in Court that another practitioner had been briefed "and was across the matter", a criminal matter which had been listed for a lengthy criminal trial. The Judge was informed by the other practitioner who was meant to be across the matter that he had not been briefed and was not across the matter. The trial Judge referred the matter to the Society for investigation.

Further, the severity of the sentence imposed by the trial Judge was appealed and the practitioner (although not

specifically representing the appellant) swore an affidavit about the conduct of the trial judge and his Honour's treatment of the practitioner which the practitioner considered prevented him from making proper submissions on behalf of his client. The appellate Court listened to the transcript and determined that there was nothing on the tapes which supported the practitioner's allegations. The Court of Appeal judges then referred this separate conduct matter to the Society.

The Disciplinary Tribunal listened to the tapes, not once but twice, on the basis that the practitioner considered that the equipment used to play the tapes in the first instance was inferior. The tapes were played again on another system provided by the practitioner.

By reference to the *repealed* Act the Disciplinary Tribunal held that the practitioner had breached s 44(1)(c)(ii) which stated:

"A practitioner must act with honesty and candour in all dealings with courts and tribunals and otherwise discharge all duties owed to courts and tribunal."

This, of course, is really an endorsement of a long held common law duty.

The Disciplinary Tribunal also held that the practitioner had breached Rule 17.6 of the Rules of Professional Conduct and Practice. PCR 17.6 states:

"A practitioner must not knowingly make a misleading statement to the Court on any matter."

There was evidence from a number of witnesses given on behalf of the practitioner, with the Society calling on evidence of the other practitioner who the practitioner alleged that he had briefed and the practitioner also stated that the other practitioner "was across the matter". The other practitioner gave evidence contrary to the allegations made by the practitioner.

Through a course of questioning of the practitioner by the trial Judge, he was able to extract from him that no-one had been briefed, however, notwithstanding the Judge being able to get admissions from the practitioner, the Tribunal did not consider that this "... *did not displace the finding of the contravention by the practitioner*" with respect to misleading the Court.

With respect to the affidavit sworn by the practitioner it was submitted to the Disciplinary Tribunal on behalf of the practitioner that there needed to be a degree of proximity and the fact that the practitioner was not representing the appellant meant that the issue of proximity had not been established. This argument was not accepted by the Disciplinary Tribunal.

Apart from some minor amendments by the Disciplinary Tribunal (with input from both parties) to the transcript of the hearing in the first instance, it was accepted this was an accurate recording. The Tribunal found there was nothing in the tapes which would suggest that the Judge was intimidating in his dealings with the practitioner. The practitioner also said the Judge spoke to him in a loud and aggressive manner which also was not accepted. The practitioner also stated that

PROFESSIONAL STANDARDS AND ETHICS

he was told to sit down on 4 separate occasions. One of these occasions was by implication only. The allegations of loudness and demeaning manner were not supported by the transcript. It in fact was noted that the practitioner had interrupted the Judge.

The Tribunal found the practitioner guilty of professional misconduct in respect of both charges, i.e. misleading the trial Judge and also swearing the affidavit used in the Appeal Court also considered to be misleading.

2. Ongoing concerns with respect to “in Court conduct”

It is unfortunate that there are presently three matters under investigation where charges may well be laid for misleading statements, two of these having been again referred by the judiciary. There is also another where charges are being considered for failure to provide details of previous disciplinary matters in another jurisdiction on application for admission and a PC in this jurisdiction.

These matters not only come under the Rules of Professional Conduct and Practice but they also come within the “fit and proper person test” which is an ongoing requirement. Where a party has previously practised in the NT and has been absent and seeking a renewal of his PC in the NT, the practitioner is required to provide Certificates of Fitness from all jurisdictions in which he/she has practised since last practising in the NT. Any failure to disclose on an application any previous disciplinary action will result in charges. This is notwithstanding

that a Certificate of Fitness discloses previous disciplinary matters. This includes any fines or reprimands and is not limited to proceedings before a Disciplinary Tribunal.

There is a fairly recent decision in Tasmania with respect to a former NT practitioner who failed to disclose disciplinary action in the NT although she only received an admonishment. There were other conduct issues considered by the Tribunal as well but nevertheless the failure to disclose previous conduct in the NT was a factor in striking her off. The decision was appealed to the Supreme Court of Tasmania and the decision of the Tribunal was upheld. It is not the disciplinary action itself but the failure to disclose which brings greater consequences. There are various older cases on this.

3. Highlighting more common breaches of Rules of Professional Conduct and Practice (PCR’s)

The Rules of Professional Conduct and Practice (PCRs) are adopted under s 756 of the Legal Profession Act. These should be read and understood and perhaps taken as cautions in avoiding complaints being upheld. The Rules are available from the Law Society’s website.

There will always be complaints and experience shows the greatest number of complaints arise in relation to Family Law matters, with criminal perhaps coming in second in comparison to other areas of law. This is not to say that these complaints are upheld. The most common area of complaint arising from PCRs can be highlighted as follows:

PCR 1.1- Acceptance of Retainer – appropriately perhaps having pride of place – do not accept instructions if you cannot act “honestly, fairly, and with competence and diligence”.

PCR 10.A - Diligence and Efficiency – eg keep the client informed at regular intervals – breach of this rule is generally considered with respect to allegations of delay. Also ensure the work required to be done is done in a timely manner. Give full and detailed **written advices** to client’s about the risks and costs of litigation. This is ongoing and not just relative to costs agreement, which should also be reviewed throughout the matter. Consideration of this Rule may also arise where a client alleges that he was misled. There is a whole raft of matters within this Rule.

PCR 11 – Preparation of Court Documents – Arising at present specifically are issues relative to 11.2. Take care what you allege in an affidavit and certainly do not allege serious misconduct without material admissible evidence to support it and also advising client of the consequences proceeding otherwise.

PCR 12 – Preparation of Court Documents – similar cautions as for PCR 11 above.

PCR 17 – Advocacy Rules – PCR 17.1 & 2 – Duty to client – advance and protect clients interests to best of your skill and diligence without your personal views being imposed – seek to assist client to understand issues and possible rights and obligations so as to allow client to give proper instructions.

PROFESSIONAL STANDARDS AND ETHICS

PCR 17.3, .4 and .5 – Independence – Avoidance of personal bias – do not be the mouthpiece of the client, exercise own forensic judgments independently as called for, after proper consideration of client's desires. To do so will not have breached duty to client particularly if it confines hearing to issues, presents case promptly and simply or informs court of any persuasive authority. Do not convey or appear to convey own personal opinion.

PCR 17.6 to 11(& onwards) – Frankness in Court – Never ever make a misleading statement in Court – if you do correct it at first opportunity – give proper disclosure as required by 17.9 in relation to interlocutory ex parte applications, i.e. do not withhold information which may be detrimental to your client. Another difficult aspect is 17.11 that, you must inform court/ tribunal of any binding authority, Full Court of Federal Court, Supreme Court of Full Court Supreme Court authority, authority on same or materially similar legislation or any applicable legislation which the practitioner reasonably believes to be directly on point, against the client's case.

PCR 18 – Communications (with other practitioners) – Ensure that all of your dealings with other practitioners are such so as to maintain the integrity

and reputation of the legal profession, ensuring courtesy without provocative or offensive language. There should be absolutely no sledging of another practitioner.

PCR 26 – Communications (with third parties) – do not make representations which practitioner believes is untrue – do not make any statement which is calculated to mislead or intimidate – do not threaten criminal proceedings to resolve concurrent civil proceedings.

PCR 32.1 & 32.2 – Dealings with the Law Society – Subject to a duty to a client practitioner must be full and frank in dealings with Society. Practitioners must respond to requests from the Society within 14 days or such other time as allowed by the Society with respect to request for comments or information in relation to practitioner's conduct or professional behaviour and furnish a full and accurate account of practitioner's conduct.

Please note - The Society has and will continue to penalize practitioner's for continued delays in not providing responses to its requests. First offence is generally 5 penalty units, i.e. \$550.00. There are usually various warnings given and submissions invited why a penalty should not be imposed. The ultimate ruling on this is, of course, a decision for the

Council of the Law Society.

4. Prevention is better than cure

In dealing with your clients always have in mind risk management practices to prevent as much as possible a disgruntled client making complaints. These mean keeping your client informed. Educate your client from the start what you will be doing and make sure you follow through on your undertakings or what you have included in your costs disclosure document about what you will be doing.

Postscript

It would be incomplete not to mention that Mr Rowbottom has complied with the orders of the Tribunal and has now been reissued with a Practising Certificate. The orders were:

- 1. The practitioner's practising certificate cancelled pursuant to s 525(3)(b) of the Legal Profession Act (LPA);***
- 2. The practitioner not be granted a practising certificate for a period of 6 months – s 525(3)(c) LPA;***
- 3. The practitioner to undertake an ethics course to the satisfaction of the Law Society - s.525(5)(b) LPA; and***
- 4. The practitioner pay the Law Society's legal fees.***



Are You Experiencing Serious Stress?

The Law Society now offers a LawCare counselling service to its members, through Employee Assistance Service Australia (EASA). The service is confidential, free and available to members and their immediate family. Please contact EASA on 1800 193 123 with your membership number to make an appointment.