Disciplinary Decisions
over the past 12 months

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DURING THE PAST TWELVE MONTHS THE SOCIETY'S COUNCIL HAS SUMMARILY DEALT WITH A NUMBER OF DISCIPLINARY COMPLAINTS UNDER SECTION 499 OF THE LEGAL PROFESSION ACT 2006 ("LPA').

Engaging in legal practice whilst not holding a current practising certificate

It is critical that practitioners ensure they hold a current practising certificate at all times when providing legal services for remuneration. It is an offence pursuant to section 18 of the LPA to engage in legal practice for reward whilst not being an Australian legal practitioner - that is, a lawyer who holds a current practising certificate (section 6 of the LPA). A failure to ensure compliance with this provision of the LPA can result in disciplinary action against the practitioner.

During the past twelve months the Society has dealt with two own motion complaints against practitioners for engaging in legal practice when they did not have a current practising certificate, each in quite different circumstances.

1 One practitioner was a very junior practitioner who had not held a practising certificate since being admitted. The practitioner commenced employment but did not apply for a practising certificate until some six weeks after commencing their employment. As part of the application process it was necessary for the practitioner to obtain Certificate of Good standing from an interstate regulatory authority. The practitioner didn't complete or submit their application for a practising certificate until after this Certificate was received. There was however, also a delay of nine days from when the application for a practising certificate signed until it was actually submitted to the Society. The practitioner however, had begun legal work in the meantime, including appearing in Court.

The Society cannot backdate a practising certificate. The earliest date that the Society can issue a practising certificate as being effective is the date on which an application has been received and is fully compliant. The practitioner had been misinformed by a colleague that it was okay to practice whilst waiting for the Society to issue the practising certificate. The practitioner candidly acknowledged in responding to this complaint that the obligation was upon them to refer to the requirements in the LPA or to make their own enquiries with the Society about their entitlement to practice, rather than relying on information from a colleague.

In dealing with this matter the Council was satisfied that the practitioner had engaged in legal practice prior to the practising certificate issuing and that this contravention of the LPA constituted unsatisfactory professional conduct.

The Council was also satisfied that it was appropriate to deal with the matter summarily pursuant to section 499 of the LPA given the

practitioner had not previously been the subject of any other complaints. The practitioner was fined five penalty units (at that time an amount of $705).

2 The other practitioner dealt with for non-compliance with section 18 was a more experienced practitioner who failed to satisfy all of the requirements for their practising certificate to be renewed. The onus is upon the practitioner to ensure that they provide all the necessary documents to the Society to enable their practising certificate application to be processed.

The Society makes every effort to communicate with practitioners regarding outstanding requirements and to remind practitioners when critical deadlines are looming, such as the expiry of a current practising certificate. This includes alerts in *The Practitioner* e-newsletter, emails and letters directly to practitioners who are at risk of not complying pending with a deadline or who are non-compliant after a deadline.

This particular practitioner had not submitted their CPD declaration (as it then was) by the due date. During the renewal period the Society received from the practitioner an application for a practising certificate as well as payment of the required fee and evidence of insurance and so the outstanding CPD declaration was the only barrier to a practising certificate issuing to the practitioner.

The Society had written to the practitioner on four occasions between May and July to remind the practitioner about their non-compliance with the requirement to submit a CPD declaration. Two of those letters also specifically identified that any further practising certificate for the next year would not issue until this outstanding requirement had been rectified and that therefore the practitioner would not be able to practice after 30 June if their CPD declaration was not submitted in time.

A staff member from the Society's Secretariat attended at the practitioner's premises, in relation to other unrelated matters, some nineteen days into the next practising certificate year. At that time it was arranged for the practitioner to complete and sign the required CPD declaration. A practising certificate was then issued to the practitioner.

The Council determined that the practitioner had engaged in legal practice in breach of section 18 and that this constituted unsatisfactory professional conduct. By the time the complaint was dealt with it was more than two years since the conduct in question had occurred. The practitioner had in the meantime retired from practice and no longer held a practising certificate. The practitioner had not been the subject of any other disciplinary findings and in the circumstances the Council was satisfied that the appropriate penalty was a private reprimand.

Non-compliance with trust account requirements

A practitioner was dealt with by the Society for non-compliance with a number of aspects of the trust account provisions of the LPA and the *Legal Profession Regulations* (LPR) following an own motion complaint against the practitioner. These non-compliances occurred following the transition of the practitioner out of private practice into a non-practising position.

The practitioner was a sole practitioner who took steps to wind up their practice in order to take up a position elsewhere. When the anticipated date for the closure of the practice approached the practitioner still had one significant litigation file which had been adjourned part heard by the Court. Consequently the practitioner decided to wind down all other aspects of the practice and to fully close the practice once that litigation matter was finalised.

The practitioner had failed to have an annual external examination undertaken on the practitioner's trust account over a period of two years - being the period during which the practice was being wound down until it was ultimately closed.

The litigation was successful for the practitioner's client and a substantial settlement sum was paid into the practitioner's trust account. Due to the complexity of the matter and various amounts that had to be disbursed from the trust funds before the balance could be released to the client, the practitioner arranged for the monies to be placed in a controlled money account to enable the client to have the benefit of interest on the monies whilst the finalisation

of the proper disbursement of the monies was worked out.

The controlled money account was only in operation for a period of approximately one month before it was able to be called in and all funds disbursed from the practitioner's trust account. However, the practitioner failed to notify the Society of the opening of the controlled money account, the closing of the controlled money account and failed to keep proper trust account records for the controlled money account as required by the LPR.

The practitioner acknowledged that they had no real understanding of the practical requirements associated with opening and operating a controlled money account. Historically the practitioner had relied on the bookkeeper employed by the practice to ensure that these requirements were satisfied. However, the practitioner had ended the services of the bookkeeper at the time of largely winding down the practice.

The practitioner came to the Society's attention when it was identified that the practice had a current balance to its trust account but that the practice had been closed and the practitioner no longer held a current practising certificate.

As a consequence, the Society appointed a trust account supervisor for the practice's trust account pursuant to section 573 of the LPA. This trust account supervisor was then responsible for overseeing the disbursement of the remaining funds in the trust account and its closure. Through this process it was identified that there were a number of ledgers within the trust accounts with funds which should have properly been paid to the Fidelity Fund as unclaimed trust monies in accordance with section 259 of the LPA.

The practitioner informed the trust account supervisor that it was their belief that in respect of all bar one ledger, the money held in trust was notionally owed to the practitioner for legal fees. The practitioner however acknowledged that no steps had been taken to facilitate the release of these monies, in particular none of the clients had been invoiced for legal fees.

Given the significant period of time that had passed in respect of each of the matters the practitioner decided to forego asserting any claim to the monies. As a consequence the funds in the practitioner's trust account were dispersed by the trust account supervisor either by refunding them back to the client or by payment to the Fidelity Fund if the client could not be located.

The Council was satisfied that the practitioner had:

- failed to notify the Society of the opening and closing of the controlled money trust account as required by regulation 77 and that this constituted a breach of section 286(1);
- failed to have their trust account externally examined during two financial years and further in those same financial years failed to notify the Society as to the appointment of an external examiner as required by regulation 72 (1) of the LPR; and
- failed to pay unclaimed trust money to the Legal Practitioners Fidelity Fund in breach of section 259(1).

Each of these findings was determined to constitute unsatisfactory professional conduct. The Council was satisfied that special circumstances existed to warrant a private reprimand as the penalty for each of these findings of unsatisfactory professional conduct.

Failure to properly advise a client, lack of costs disclosure and non-responsiveness to Society

The complaint against this practitioner originated from their client who complained about a number of aspects of the practitioner's conduct. Ultimately the majority of the allegations by the client were dismissed by the Society although two grounds of the complaint were upheld by the Society.

An additional ground of complaint also arose from the practitioner's lack of responsiveness during the complaint investigation.

The client had engaged the practitioner to represent them in respect of unfair dismissal claim. One ground of complaint related to costs disclosure.

Section 303(1) sets out the various information that a law practice must give to their client about their potential legal costs

(which is defined under the LPA to include disbursements) by way of a costs disclosure. This includes a requirement to provide an estimate of the total legal costs and if this is not possible then a range of the estimated costs and an explanation of the factors that might impact on the estimate.

There is also an ongoing obligation in respect of costs disclosure – section 310 requires a law practice to disclose to a client any substantial change to anything included in the earlier disclosure. This places an obligation on a law practice to advise the client of any changes to the estimate of their total legal costs as the matter progresses.

The practitioner provided a costs disclosure notice to the client with a limited estimate (relating to the provision of initial advice) although the scope of the retainer extended to representation in the proceedings. As the matter progressed the client requested on at least three occasions a "quote" of the fees the client might expect in the matter.

Some months later the client was advised that they needed to place a sum of money in trust. It was considered that this was not sufficient to constitute the estimate that the client was seeking, and which the practitioner was obligated to provide.

The practitioner appeared with the client at the initial mention of the matter and directions were made for the client to file material by a particular date. There was a subsequent conference between the practitioner and the client and during the investigation of the complaint the practitioner and the client provided differing accounts as to whether instructions had been given to proceed with the hearing or whether a request was made for funds to be paid into trust in order for the practitioner to continue acting.

Neither the practitioner nor the client made contact with the other during the month following this conference which included the due date for the filing of material. Four days after the deadline had passed the practitioner contacted the client to arrange a further conference, this time with Counsel.

It was determined that the practitioner should have properly advised the client that no further steps would be taken until arrangements were made for payment of fees and that the client would be responsible for complying with the direction to file material. Advice such as this should be given in writing to ensure that the client is fully aware of their position.

The final aspect of the complaint arose as a result of the practitioner not responding to the Society's letters about the complaint. In accordance with section 475 of the LPA the complaint was sent to the practitioner. This letter also reminded the practitioner about their obligations under Rule 32.2 of the *Rules of Professional Conduct and Practice* (*Rules*). Two letters were sent to the practitioner reminding of the obligation under Rule 32.2 and seeking the practitioner's response to the complaint. The practitioner ultimately provided a response to the complaint over three months after the initial letter about the complaint.

In determining this aspect of the complaint the Council had regard not only to a practitioner's duties under the LPA and the *Rules* but also the common law duties owed by practitioners toward their regulatory and professional bodies[1]. This includes a duty that practitioners have to co-operate reasonably, including responding to inquiries, with a regulatory body charged with investigating conduct complaints.

Whilst dismissing the remainder of the grounds in the complaint the Council was satisfied that the practitioner had:

- failed to properly advised the client about their obligation in relation to compliance with the directions as well as the practitioner's intention not to conduct further work on the client's behalf pending arrangement for fees;
- failed to comply with their obligations pursuant to section 303, 305 and 310 of the LPA; and
- failed to respond to letters from the Society about this complaint matter which was not in compliance with the practitioner's common law duties and in breach of Rule 32.2.

The Council determined that each of these findings constituted unsatisfactory professional conduct and that these matters should be dealt with summarily pursuant to section 499 of the LPA. Fines were imposed for each ground of complaint of three penalty units, four penalty units and three penalty units respectively – a total fine of $1,410 at the time. ●

Endnotes

1. See *Johns v Law Society of NSW* [1982] 2 NSWLR 1 at page 6; the unreported decision of the New South Wales Supreme Court in *Council of the Law Society of New South Wales v Veghelyi* delivered on 6 September 1989 at page 16; *Council of the Queensland Law Society v Whitman* [2003] QCA 438 at [35] – [36].