THE OFFICE OF THE
LEGAL SERVICES COMMISSIONER

'COMPLAINTS AGAINST LAWYERS. WHAT REALLY HAPPENS AT THE OLSC'

June 2011

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 professionals.

The OLSC receives all complaints about barristers and solicitors in NSW. The complaints process usually commences when a complainant telephones the OLSC's Inquiry Line to discuss their complaint on an informal basis with trained OLSC staff. During the telephone call, an OLSC inquiry line officer will discuss the nature of the complaint. Inquiry line staff cannot give legal advice but they can assist the complainant in clarifying the points in dispute, explain to the complaint's his/her rights, help the complainant consider his/her options and mediate simple matters. The OLSC encourages complainants to first try to resolve their complaint with their solicitor or barrister by talking to, or writing to the practitioner, before making a formal complaint. If the complainant does not wish to resolve their complaint in the first instance with his/her barrister or solicitor, the inquiry line officer will notify the complainant that s/he can make a formal complaint. A complaint is formally made when a complainant lodges a complaint form or forwards a letter of complaint to the OLSC. Section 506 of the *LPA 2004* provides that a complaint must be made within three years of the conduct that is the subject of the complaint.

Once a complaint is received at the OLSC it is examined as to whether it is a "consumer dispute" or whether the complaint raises allegations of misconduct against a practitioner. "Consumer disputes" are disputes between legal practitioners and users of legal services. Consumer disputes do not involve misconduct. Examples of consumer disputes are complaints about poor communication, costs, mistakes, delays, handling of documents and poor service. More than 50% of the complaints we receive can be classed as consumer disputes. If a complaint raises a question of misconduct on the part of the practitioner, the complaint will be

investigated. Such conduct can either amount to unsatisfactory professional conduct or professional misconduct.

COMPLAINTS

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 8708 calls from the public on our Inquiry Line.

The most common types of complaints we receive relate to billing, 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.

One of the main reasons why the concept of proportionality is not being applied effectively 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* provide 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.

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.

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. The

obligation of courtesy arises from the ethical duties of legal practitioners enshrined in the common law and in practice rules as well as the obligation of courtesy as moral citizens.

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[1], 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.

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.[2] We are aware of legal practitioners behaving in this manner.

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:

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

[2] See Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10. Geo. J. Legal Ethics (1997) 367, 379.

"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 "fucking prick" and a "little smartarse." Proceedings were instituted in The Administrative Decisions Tribunal. The Trobunal 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.

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.

A legal practitioner's failure to honor an undertaking can amount to either unsatisfactory professional conduct or professional misconduct. A finding of professional misconduct is most common in circumstances where the failure to honor an undertaking was deliberate and no reasonable explanation as to the failure was given. On the other hand a finding of unsatisfactory professional conduct will commonly occur if the failure to honor the undertaking was an isolated incident and a reasonable excuse was provided.

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.

THE ETHICAL DUTIES OF ALL LEGAL PRACTITIONERS

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. 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 rules.

CONCLUSION

Recognition that the legal profession has an ethical duty to apply moral and ethical decision-making is not a role for legal practitioners alone. Regulators of the legal profession also have a major role to play in ensuring that law firms act ethically and promote professionalism. The OLSC understood the role that regulators need to play in this pursuit at an early stage. To this end the OLSC has always employed an effective and responsive regulatory regime that seeks to encourage lawyers to adopt more ethical work practices. At the heart of the OLSC's approach lies the notion of 'regulating for professionalism.' So, when the OLSC receives a complaint against a lawyer, our first response, where possible and appropriate is not to prosecute the lawyer but to work with him/her in trying to determine the underlying basis of the complaint. The OLSC's role as a regulator is therefore to work with the profession rather than against them in entrenching an ethical culture and promoting professionalism, while reducing complaints. This 'education towards compliance' framework is the dominant paradigm of the OLSC and sits well our philosophical approach of 'regulating for professionalism.'