Without Prejudice

CLIENTS AND CONDUCT

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Legal Services Commissioner, Steve Mark.

Don't forget to say when the bill is getting bigger!

Legal practitioners in NSW are reasonably familiar with requirements of the *Legal Profession Act 1987* which have made it mandatory since 1994 for them to disclose estimated costs in writing.

These disclosure requirements were introduced so that consumers could make informed commercial choices. While most firms now disclose estimates of their costs, they are still failing to advise clients of significant increases to the original estimate – also a mandatory requirement of the Act.

New look at conflict of interest

The OLSC also provides input to legislative reform and is involved in a range of external committees and forums.

We've received over 110 complaints so far this financial year that raise issues of conflict of interest. In addition, the inquiry into HIH has also identified a number of potential conflict situations. The Attorney General has requested that we establish a working group to reassess the rules in relation to conflict of interests (see page 3 story).

Steve Mark
Legal Services Commissioner

Tighter regulation of advertising for personal injury services

The Legal Profession Amendment (Personal Injury Advertising) Regulation 2003 came into effect on 23 May bringing with it tighter restrictions for legal practitioners regarding the advertising of personal injury services, breaches of which are a criminal offence and deemed to be professional misconduct.

Replacing Part 14 of the *Legal Profession Regulation 2002,* the new Regulation broadens the current restrictions on the content and method of advertising by prohibiting the publication of any advertisement that refers to or depicts personal injury, matters related to personal injury - such as an activity, event or circumstance that suggests personal injury, or a possible cause of personal injury - or legal services related to the recovery of money relating to personal injury.

The new Regulation allows for more exceptions than was previously the case but is more particular in what is required for them, such as allowing advertising to existing clients but not to any other person, or advertising within the practice but only if it can't be seen from outside.

Advertising content finalised prior to the Regulation's gazettal date of 9 May, may be covered by the Regulation's transitional provisions and may be published after the Regulation came into effect. However, the OLSC considers that finalisation for the purposes of the transitional provisions does not apply where the advertisement's content, wording, format or pictures could have been changed prior to 9 May 2003. It may also be the case that a contract with a publisher for a period of time may not entirely protect the advertising practitioner if any offensive wording of the advertisement could be altered during the term of the contract.

We anticipate some lively debate and disagreement on the regulation generally and its interpretation in particular.

Information sharing arrangements with regulators

New information sharing arrangements agreed in May between major watchdog agencies will lead to improved cooperation between the OLSC and the NSW Ombudsman's Office and other regulators.

Part 6, sections 42(1) and 43(1) of the *Ombudsman's Act, 1974,* allows two or more agencies to refer complaints among themselves as well as enter into arrangements for sharing information.

Agreed to by the NSW Legal Services Commissioner, the Health Care Complaints Commissioner, President of the Anti-Discrimination Board and the NSW Privacy Commissioner, the arrangements ensure complaints are considered within all appropriate jurisdictions and allow for concurrent and coordinated investigations.

The arrangements allow for information to be disclosed to any of the above agencies where the other agency requests it in order to carry out its functions, or in those instances where two or more relevant agencies have overlapping or adjunct jurisdictions.

The arrangements safeguard privacy and confidentiality of all information relating to the complaint by requiring the complainant's consent for referral of the complaint to another agency. Similarly, sensitive personal information cannot be disclosed without the complainant's consent which must also be given for the provision of relevant information to the other agency.

The referring agencies also have to consider the nature and scope of the secrecy obligations of the agency to which the complaint is being referred.

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Solicitors' undertakings should not be given lightly

Legal practitioners often make undertakings, with each other to facilitate the transfer of files, to the courts, or to engage third party service providers on behalf of clients. Regardless of the purpose, the OLSC advises practitioners to always consider the consequences of such undertakings.

Undertakings are a hallmark of an honourable legal profession based on the notion that a practitioner's word can be relied upon. The fundamental obligations of a practitioner giving an undertaking are provided in the *Solicitors' Rules,* Rule 26 and 33.

Generally, the Rules state 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 honour 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,"* in circumstances where it might reasonably be expected that the undertaking will be relied upon by the other party.

Undertakings are often used to facilitate the transfer of files from one practitioner to another, where the recipient practitioner undertakes to ensure the first practitioner's fees are paid, or protected, at the conclusion of the matter. The first practitioner will transfer the file on the strength of the promise.

Undertakings are also implicit where third party service providers are engaged on behalf of a client. However, where arrangements for payment of the service provider are not communicated clearly by the practitioner, the terms of Rule 32 allow the service provider to primarily seek payment of their costs from the practitioner in the event of a dispute, giving rise to an implicit undertaking.

Undertakings can also be made to courts, professional associations or the OLSC. Failure to comply with these undertakings can amount to unsatisfactory professional conduct or professional misconduct.

We urge all practitioners to carefully consider each and every undertaking, be it in writing or given verbally, and consider the possible consequences of a breach of such agreements.

The OLSC issues warnings to practitioners shown to be in minor breach of the *Legal Profession Act, 1987* or regulations. Along with such warnings, we are now asking for undertakings that the conduct will not be repeated. There is a strong likelihood disciplinary action will be taken for any breach of such undertakings.

OLSC out and about

Brian O'Connell (left), Chamber Magistrate at Armidale Local Court, learns more about the OLSC from Assistant Commissioner Complaints, Jim Milne (right).

Staff from the OLSC recently visited the New England region of NSW as part of a broad educational strategy aimed at improving compliance among future practitioners and increasing understanding among consumers of how the legal system operates.

Beginning with a presentation to the North and North West Community Legal Service in Armidale, Assistant Commissioner Complaints, Jim Milne, and Education and Communication Officer, Louise McDermott, also lectured to third year legal ethics and conduct students at the University of New England's law faculty, community sector organisations and the Local Court Chamber Magistrate.

The presentations were all slightly different, says Jim Milne, but conveyed central messages of relevance to each target audience.

Community Legal Centre staff and volunteers were told that the number of complaints about regional and rural based lawyers were relatively small by comparison to those about suburban sole practitioners. They were provided with an overview of the OLSC, it's history, powers, the processes for complaint handling, the legal matters about which complaints are most often made, and statistics from the 2001-2002 financial year.

"Our educational program for law students, however, is very much about how we work, what they - as future practitioners - can expect from us if and when a complaint is made about them, and the sorts of things that are considered in determining whether or not conduct is likely to be considered as professional misconduct or unsatisfactory professional conduct by the Administrative Decisions Tribunal," Mr Milne says.

Students are presented with case studies based on real complaints which explore the conundrums practitioners can face when trying to act in the best interests of their clients as well as abide by professional rules. The talks also provide an opportunity for questions from students who take the opportunity to ask such things as what is considered in determining that a reprimand should be public or private? And, is a reprimand for the offence or for the *consequence* of the offence?

The presentation to Armidale community sector organisations focussed more on promoting realistic expectations of the legal system by highlighting legal processes and offering advice on how to assist people who may be in dispute with their lawyer and how to establish good communication channels from the outset.

The community sector also heard about specific complaints related to 'no-win no-fee' and 'first appointment free' legal relationships.

The OLSC met with Armidale Local Court Chamber Magistrate, Mr Brian O'Connell, who, as a first point of contact for people involved in legal matters, was made aware of what the OLSC can and cannot do and given useful information to convey to consumers.

The OLSC has delivered about 15 presentations since July last year to university undergraduate law students and those in final stage pre-profession Practical Legal Training. Fifteen presentations have already been scheduled for 2003-2004, with more anticipated. These are in addition to the programs run for regional law societies by the Commissioner.

An education project team has recently been established within the OLSC to develop an expanded and more comprehensive education strategy that will further promote compliance and high ethical standards amongst the profession and more realistic expectations of the legal system amongst the community.

The project team will use feedback from existing educational strategies to evaluate effectiveness and whether we are meeting the needs of the profession and consumers. We will also, in association with other regulatory organisations, assess our own program in comparison with other authorities involved in larger-scale educational programs. We will continue to keep you informed in *Without Prejudice.*

Steps are being taken to help lawyers identify and deal with real and perceived conflicts of interest

OLSC Legal and Policy Officer, Aideen McGarrigle, will contribute to a new working party on conflicts of interest.

A new working party being established by the Legal Services Commissioner will enquire into and review the law and practice relating to conflicts of interest with a view to proposing more transparent and effective ways of identifying and remedying perceived and actual conflicts of interest in litigious and non-litigious matters.

Approved by the NSW Attorney General, Bob Debus, the new working party aims to address some of the common complaints received by the OLSC, and in particular, those highlighted by HIH Royal Commissioner Neville Owen, when he commented that legal practitioners are not abiding by professional rules regarding conflicts of interest.

The OLSC recognises the need for a change in the process of identifying and managing conflicts of interest. Conflicts of interest arise in matters where a legal practitioner puts his or her interest above the client, a practitioner acts in concurrent representation or a practitioner acts against a former client.

The changing legal environment - in particular the development of incorporated legal practices - the increased mobility of the legal profession, and increasing specialisation of practitioners, has thrown up new ethical dilemmas for the profession regarding conflicts of interest, particularly when a firm acts against a former client.

Raised by Commissioner, Steve Mark, in a recent article in the *Australian Financial Review,* the OLSC remains concerned that lawyers seem unable to identify perceived conflicts of interest and seem prepared to act in conflict situations.

"They also lack transparent practices when it comes to recognising and dealing with perceived conflicts of interest," Mr Mark says. "I believe this perception of conflict damages the profession's reputation."

A legal practitioner's personal interest must never conflict with those of a client. This proscription is premised on the fiduciary relationship the legal practitioner has with the client, maintaining the integrity of the legal profession and public confidence in the legal system.[1]

Legal and Policy Officer with the OLSC, Aideen McGarrigle, who will be one of those representing the OLSC's concerns on the working party, says the most common example of complaints received by the OLSC regarding conflicts of interest in concurrent representation relate to those instances when a practitioner acts for both vendor and purchaser in a conveyance matter or in the drawing up of a business contract.

As Ms McGarrigle explains, practitioners are required to give full and effective representation to their clients, which may not be possible if the interests of the two clients actually or potentially conflict. In *Blackwell v Barroile Pty Ltd*[2] Davies and Lee JJ said: *"Full and effective representation to clients is an ethical rule of long standing which goes to the core of the solicitor-client relationship, the maintenance and protection of which is a matter of public interest reflected in the doctrine of professional privilege. It is central to the preservation of public confidence in the administration of justice".*

A practitioner must disclose the conflict of interest to all parties when acting for two or more parties. They can act for two or more parties but only after they have obtained the informed consent of all parties, and have advised them that the practitioner may not be able to disclose to either party the full extent of their knowledge relating to the transaction or may not be able to advise one client if that advice conflicts with the interests of the other client.[3]

"The important question is how the practitioner is *impaired* by the conflict," Ms McGarrigle says. "Acting for two or more parties in a litigious matter, for example, is considered to be fraught with problems and should be avoided."

As officers of the court with fiduciary duties, it is incumbent upon legal practitioners to act in good faith, use their expertise and skill to forward the interests of their client, and avoid doing anything that may conflict with that duty.[4] Bound up with these duties is the obligation not to disclose information of a confidential nature which has come to the practitioner's knowledge by virtue of the retainer.[5] It is the relationship between these inconsistent duties that can give rise to conflicts of interest when a legal practitioner acts against a former client.

Common complaints received by the OLSC include complaints about practitioners acting for one spouse in a family law matter when they previously acted for them as a couple, or where a practitioner acts for one person in a business partnership dispute, but who previously acted for the partnership.

The working party will be looking at more powers and a stronger role for the regulatory bodies in enforcing the professional rules.

"The concern for the OLSC is that the court is presently the main avenue people pursue to have a lawyer restrained and that process is often driven by self-interest," the Commissioner says.

However, the OLSC acknowledges that the commercial reality and cognate requirements of providing legal services needs to be balanced with good ethical practices and that the two are not mutually exclusive.

It is anticipated the working party will go some way towards finding this balance.

[1] See *Australian Securities v Bell* (1991) 1 NSWLR 879
[2] (1994) 123 ALR 81
[3] *Clarke Boyce v Mouat* (1993) 3 WLR 1021
[4] *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154 at 170 per Street CJ
[5] See r2 of the Rules

The Commissioner's powers and responsibilities when an investigation ends

The standards of proof required by section 155 of the *Legal Profession Act 1987* will benefit from a review, according to Legal Services Commissioner, Steve Mark.

While every complainant to the OLSC thinks their matter is serious, it might not be serious enough to meet the standards required by the Act to amount to professional misconduct or unsatisfactory professional conduct.

Sections 155 and 155A of the Act, provide a mechanism to ensure that every complaint investigated is not automatically referred to the Administrative Decisions Tribunal for a determination, regardless of its merit.

However, the high standard of proof required by section 155 poses difficulties. For example, s 155 ss 2 requires the Commissioner to instigate proceedings in the Tribunal if he is satisfied there's a *reasonable likelihood* the practitioner would be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct. Similarly, the complaint must be dismissed if there is no reasonable likelihood the practitioner would be found guilty.

In addition, the Commissioner must consider what standard of proof the Tribunal would apply. "I therefore have to put myself in the position of the Tribunal in order to be satisfied there's a reasonable likelihood of the Tribunal making a guilty finding", Mr Mark says.

Unlike the criminal jurisdiction's high standard of proof, *beyond a reasonable doubt,* and the civil jurisdiction's standard of *on the balance of probabilities,* the protective jurisdiction of the Administrative Decisions Tribunal requires the standard of *"comfortable satisfaction"*- or the Briginshaw test.

The Commissioner must refer practitioners to the Tribunal if he believes there's a *reasonable likelihood* the Tribunal would be *comfortably satisfied* of the guilt of the practitioner in relation to professional misconduct and unsatisfactory professional conduct. This is a very high standard.

An alternative to referral to the Tribunal is provided with section 155 ss 3 where, if the Commissioner is satisfied there's a reasonable likelihood the practitioner would be found guilty of unsatisfactory professional conduct, but not professional misconduct, he can offer a consent reprimand or dismiss the complaint if he is satisfied the practitioner is generally competent and diligent and has no other material complaints against them. These types of dismissals, however, shouldn't be given more than once for the same type of behaviour.

As a result of the standard established by the Act, it is virtually impossible for the Commissioner to form the view that there is a reasonable likelihood the Tribunal would be comfortably satisfied as to a practitioner's guilt when the OSLC has only one person's uncorroborated evidence against the uncorroborated evidence of another, as is frequently the case.

"Those two standards of *reasonable likelihood* and *comfortable satisfaction,* put together, make it impossible for us to make a determination that an individual could be found guilty of professional misconduct simply on uncorroborated evidence."

"Another large area of frustration for the OLSC is that 'mere' negligence does not amount to misconduct and the compensatory powers of the Tribunal are such that no compensation is available if a claim could be made against the practitioner's professional indemnity insurance or to the fidelity fund or to another court. We constantly have to tell complainants their complaint is not misconduct but is actually negligence and their only recourse is to sue the practitioner," the Commissioner says.

The *Legal Profession Act 1987* has been reviewed by the Law Reform Commission and the Attorney General's Department and submissions are presently before the Attorney General for consideration.

Phone inquiries continue to increase

Calls to the OLSC Inquiry line from January to May this year have reached 4070 with more calls taken in the generally quieter January, February and March months than those received for the same period last year.

Consistent with averages taken across the year, the legal matter most frequently complained about for all months except May was conveyancing, which dropped to second place in May after family law/de facto matters.

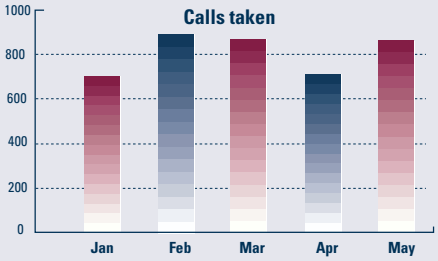
The other areas most frequently complained about were personal injury and other civil matters.

Consumers complained mostly about delay in January, February and May, while overcharging and quality of service were the most commonly complained about issues in March and April respectively.

Calls about rights to dispute bills and costs inquiries were also among the most frequently raised issues on the inquiry line from January to May.

Legal matters complained about January - May 2003

Inquiry line calls- January - May 2003



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