

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

ISSUE 33 • MAY 2005

Commissioner's Comment

2005 has already been a very busy year. We have been involved in a number of absorbing projects.

The Cost Review Panel, established in 2004 by Premier Carr to review the current legal costs system, has finished taking submissions. Members of the panel – Laurie Glanfield, director of the Attorney General's Department, President of the NSW Bar Association Ian Harrison SC, President of the Law Society John MacIntyre and myself – are currently finalising a report with recommendations for reforms.

The new Legal Profession Act is expected to come into effect later this year. OLSC staff is currently undergoing training in the sections of the new Act as we prepare to educate practitioners, law students and the community at large. The new Act will also impact all of our publications and many of our policies and procedures, all of which will need to be revised and updated accordingly. I will be discussing our new Act in detail in the next edition of this newsletter.

Our work with Incorporated Legal Practices (ILPs) has been a great success. There are now over 410 ILPs in operation in NSW and this year we look forward to the challenge of an increase in that figure as more practices choose to incorporate. The OLSC has worked closely with ILPs in establishing a guide to identifying and developing appropriate management systems; changes to our Act in the second half of this year will bring increased responsibilities in relation to both auditing ILPs and overseeing the compliance of all firms to the LPA generally.

The Working Party on Conflict of Interest, established under the auspices of the Attorney General in 2004 to enquire into and review the

law and practice relating to conflicts of interest, is currently reviewing a discussion paper so that a final report can be presented to the Attorney General for his consideration.

Meanwhile our education and training policies, targeted to both the consumer and practitioner, are constantly under review and continue to expand. Every year the OLSC presents lectures to law students at University of Newcastle, Wollongong, Western Sydney, University of Technology, Macquarie and the College of Law. We have just finished our first semester of lectures at the University of New South Wales wherein we addressed undergraduate and postgraduate law students on the practical applications of the LPA and the role of the OLSC.

I welcome your response to any of the issues that are raised this edition of Without Prejudice. You'll find our email and postal addresses on the bottom of page 4.

With the volume of work concerning complaints, legislation reform and policy development that is generated from this office, it might appear that we lose sight of the fact that our core work concerns people – clients and practitioners alike. This is definitely not the case. In this edition of Without Prejudice we will explore two critical issues that affect not only a practitioner's work but their health and well-being.

Steve Mark
Legal Services Commissioner



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Substance Abuse



Last year I was invited to attend the annual American Bar Association Conference. As always the papers and discussions which they provoked were informative and lively – though none so much as an excellent presentation by Associate Professor Martha Brown on substance abuse within the legal profession.

Professor Brown estimated that of the more than one million practising lawyers in the US, up to one third may be experiencing problems with substance abuse including alcohol, prescription and non-prescription drugs.

Law is a stressful and draining career. When people attempt to address their stress through excessive use of alcohol or drugs (lawful and unlawful) both the profession and the community have a serious problem. However, when the use of alcohol or drugs involves not only unlawful behaviour but also a serious impediment to the profession's integrity, it is important that regulatory bodies acknowledge the problem with open discussion and attempts at solutions.

Anecdotally through the complaint handling process, the OLSC is aware that similar problems of substance abuse exist within the profession here in NSW. As in any area of the community, it is difficult to measure the impact the use of drugs or alcohol has on the practice of law.

Complaints to the OLSC about practitioners alleging misconduct because of substance abuse form only a small number of our total complaints and these types of complaints are difficult to substantiate. However, it is worth noting that complaints in this area come not only from clients but from professional colleagues, or in some

instances from practitioners who take over files from others whose apparent problems have impacted on the service they provided.

In the United States nearly all jurisdictions have implemented policies for dealing with substance abuse in an attempt to provide long term solutions in the form of treatment and counselling services. Some states put the onus on practitioners to report colleagues (in confidence) who they believe have abuse problems; however, in California, it can be professional misconduct for a practitioner not to disclose the identity of a practitioner who they know has a substance abuse problem.

The American experience has led to innovative support services that acknowledge not only the impact of alcoholism and drug abuse but also some of the causes. In 1988 the American Bar Association formed the Commission on Impaired Attorneys in direct response to the growing awareness of substance abuse amongst lawyers. In 1996 the Commission changed their name to the Commission on Lawyer Assistance Program and have extended their services to address issues of stress, depression and other mental health problems.

Assistance and support is also available to practitioners in NSW. Barristers and solicitors can seek confidential advice

and counselling from Bar Care at the Barristers' Association and at Law Care at the Law Society.

Bar Care will pay for a barrister's first session with an allocated health professional. No details of the person receiving treatment are kept – the billing arrangement is recorded by a number only. After the first consultation the barrister can then choose how they will pursue their treatment. Bar Care can be contacted through the Bar Association on 9232.4055.

The Law Society offers a number of services for practitioners in need of assistance. Through Law Care, a practitioner or concerned family members or colleagues can discuss an addiction problem with a medical doctor who will be able to refer them to an appropriate health professional. To access this service, those concerned can contact the Law Society or look under *Members Services* on the Law Society's website. Practitioners can also call the Law Assistance Program for help with a broad range of problems. Contact can be made through the Law Society on 9926. 0333 or go to the Law Assistance Program website – www.lap.com.au. Both Law Care and the Law Assistance Program receive several calls a week and all matters are handled in complete confidence.

Similar services will soon be available to the judiciary. Earlier this year the Attorney General announced a review of the Judicial Commission, which discussed the development of a scheme whereby judges would have access to 24 hour counselling, annual medical checks and treatment for serious health issues. It is hoped that such a service will be rolled out in the not-to-distant future.

The OLSC realises that, in light of the anecdotal evidence we have from complaints and the acknowledged existence of substance abuse problems amongst practitioners in the United States and the United Kingdom, it is timely to explore mechanisms to address the issue here in NSW.

What do you think? I'd be interested to hear your view on this, be it personal views on regulating substance abuse within the legal profession or first hand experience of substance abuse problems that you may have encountered.

When Files Freeze

It is an unfortunate fact of life that most practitioners at one time or another will have the file they just cannot face. When this happens the situation can feed on itself, causing more stress – the factor which may have caused the freeze in the first place.



The longer the file is avoided the more difficult it can be to address.

We have often dealt with practitioners who have "frozen" on a file. The outcome is similar – the practitioner acknowledges the matter but weeks passed while the file grew colder and the matter delayed further. In many instances the practitioner watched the situation snowball to the point where it seemed impossible to be remedied: in one notable instance a practitioner, after years of handling a personal injury matter, paid compensation from their own pocket rather than admit to the client they had not ever lodged the matter with a court. The "freeze" was uncovered when the client complained to the OLSC that the practitioner should have paid interest on the settlement money that the practitioner had supposedly received.

Files that freeze are not necessarily complex matters – sometimes they can be remarkably straightforward. In some cases this has been the

root of the problem – a seemingly routine matter was put aside while more demanding files were finalised. Eventually the simple file is delayed, then there are calls from the client...then the file becomes too cold to handle.

My advice to practitioners with freezing files is to tackle them now. Far better to own up early, advise the client that there has been a problem, make an apology and explain what you are doing to remedy that problem rather than deal with a formal complaint to the OLSC.

However embarrassing it might be the short-lived humiliation is surely better than a permanent black mark on your record and perhaps a civil suit for negligence.

If the file freeze is caused by other factors, take advantage of the services offered by Law Care or Bar Care.

The longer you leave it, the harder that file – and its consequences – becomes.

Common complaints made to the OLSC



1. RUDENESS

In previous issues of *Without Prejudice* we have identified an area of complaint with which the OLSC deals frequently and discussed the ways we seek to resolve this complaint. In this issue we will address rudeness.

A large proportion of the complaints we receive concern poor communication in one form or another. Rudeness is the most common amongst these complaints. Sometimes the complainant is another practitioner; more often though, the complainant is a client or opposing client.

In assessing allegations of rudeness I am guided by the practice rules and the case *Law Society of New South Wales re Constantine Karageorge* where the Solicitor's Statutory Committee (now the Legal Services Division of the ADT) commented, "*There may be some acts which, although they would not be disgraceful in any other person, yet if they are done by a solicitor in relation to his profession may fairly be considered disgraceful and dishonourable conduct.*" The ADT considered the practitioner's threatening, racist abuse was Professional Misconduct and he was fined.

The majority of complaints of rudeness are difficult to resolve – one person's insult can be another's term of endearment.

In most instances we are caught between two versions of events – what the complainant says they heard as opposed to what the practitioner maintains they said. It is rarely possible for me to ever prefer one version of events over another, and those of you familiar with the LPA know that we cannot compel a practitioner to apologise for comments he or she made.

This is not to say we don't take complaints of rudeness seriously. I have issued reprimands to practitioners when their communication with client has been rude.

Communication is your primary asset – use it as a tool, not as a weapon.

Coming Up

In the next edition of *Without Prejudice* I will be discussing in detail the amendments to the Legal Profession Act that are anticipated later this year. These amendments impact on our regulatory role and will in turn impact on all practitioners in NSW.

Comments? Suggestions? Something you'd like to know more about?
Write to us at OLSC@agd.nsw.gov.au



WITHOUT PREJUDICE is published by The Office of the Legal Services Commissioner

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