

PROFESSIONAL CONDUCT CASE STUDY

By Steve Mark, Legal Services Commissioner (NSW)

The OLSC received a complaint about a legal practitioner who had been acting for the complainant in criminal proceedings. The complainant had been involved in an serious physical altercation at a hotel. The complainant and another person were arrested and were initially charged with affray. At the time of their arrest, the complainant participated in an ERISP interview and made admissions to assaulting two persons.

Following arrest, the complainant and the other person retained the legal practitioner. The police subsequently laid five (5) further assault charges against the complainant. This led to a plea offer by the NSW Office of the Director of Public Prosecutions (“DPP”), subject to an agreed statement of facts (ASF). A draft ASF was provided to the legal practitioner. The draft ASF differed markedly from the ERISP, in that it acknowledged culpability of the complainant in three (3) additional physical assaults against other persons.

Ultimately the DPP presented an indictment before the District Court in Sydney and filed the ASF in identical terms to the draft ASF. The ASF contained a handwritten annotation

stating that the legal practitioner signed it. The complainant pleaded guilty and the matter was adjourned for sentence. At the sentence hearing a probation and parole report was filed. The sentencing judge noticed that the probation and parole report was inconsistent with the ASF, as it indicated that the complainant was not involved in the three (3) assaults, whereas the ASF acknowledged involvement. The matter was then adjourned so that the inconsistency could be resolved.

On the day of sentence, the legal practitioner informed Counsel that the inconsistency was resolved and that the complainant wanted to be dealt with according to the ASF. Counsel then made those submissions to the Court.

The Court convicted the complainant and sentenced the complainant according to the ASF. The complainant was sentenced to five years imprisonment, with two and a half years non-parole. The complainant terminated his retainer with the legal practitioner and engaged another legal practitioner to lodge an appeal with the NSWCCA.

The main ground of the appeal to the NSWCCA was that the pleas of guilty were not attributable to a genuine consciousness of guilt but were entered by reason of the imprudent and inappropriate advice from the legal practitioner, causing a miscarriage of justice.



PROFESSIONAL CONDUCT CASE STUDY *continued*

The ASF and the circumstances surrounding its negotiation, filing, and use in the proceedings were a critical issue in the appeal.

The complainant alleged that the legal practitioner was negligent in that he had failed to ensure that he sufficiently understood the charges he was pleading guilty to. The complainant also submitted that the legal practitioner did not sufficiently ensure that he understood and agreed with the ASF that were to be put to the Court to support his plea of guilty.

The complainant stated that the ERISP was the correct account of what happened and not the ASF. The complainant further submitted that the ASF was never shown, read or agreed to by him, and that he was first aware of the contents of the ASF when the Judge read it out during the sentencing proceedings. The complainant states that he never signed nor was given a copy of the ASF.

During the NSWCCA appeal proceedings, the legal practitioner was required to file an affidavit and was cross-examined extensively as to his conduct.

The legal practitioner gave sworn evidence that he had explained the charges and believed that the complainant sufficiently understood the charges he was pleading guilty to. The legal practitioner also stated that if he had known the complainant was confused about what he was pleading to, he would have adjourned the matter in an attempt to clarify the issues. In relation to the ASF, the legal practitioner stated that he believed he spoke

about it to the complainant on several occasions and obtained instructions from the complainant. In his sworn evidence before the NSWCCA, the legal practitioner could not, however, identify any specific occasion when he went through the ASF with the complainant, or drew his attention to the significant inconsistencies with the ERISP interview, or even gave the complainant a copy of the ASF. The legal practitioner admitted that he did not keep any note of any conference he had with the complainant, and never obtained any written statement from him, including any written acknowledgement on the indictment or on the ASF.

The NSWCCA found that there was a serious miscarriage of justice and immediately set aside the complainant's pleas of guilty and quashed the convictions. The Court made a number of adverse comments about the legal practitioner's conduct and his sworn evidence.

The NSWCCA found, in contradiction to the sworn evidence of the legal practitioner, that at the time the complainant pleaded guilty, he had no idea of the details of the facts that were to be put to the Court to support his plea. The NSWCCA came to a "clear" view at no time was the ASF ever explained to the complainant. The NSWCCA was critical of the legal practitioner's repeated failure to have any written instructions or any written file notes.

The Legal Service Commissioner independently investigated the complainant's allegations about the legal

practitioner, and ultimately came to the same view as the NSWCCA. The Legal Services Commissioner was satisfied that the legal practitioner did not explain and ensure that the complainant sufficiently understood the charges he was pleading guilty to and that the legal practitioner did not sufficiently ensure that the complainant understood and agreed with the ASF.

The Legal Services Commissioner was satisfied that there was a reasonable likelihood that the legal practitioner would be found by the Tribunal to have engaged in unsatisfactory professional conduct as defined in the *Legal Profession Act 2004 (NSW)*, and publicly reprimand the legal practitioner.

Comment

Clause 17, Rule 23 of the *Revised Professional Conduct and Practice Rules 1995* provides that a legal practitioner "must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case."

The obligation to assist one's client is fundamental to the effective practise of law. It is imperative that legal practitioners take time to ensure that their clients understand all of the issues in their matter as well as all of their rights and obligations clearly.



INCORPORATED LEGAL PRACTICES (ILP) RESEARCH PROJECT 2012/2013

In 2006 the Centre for Applied Philosophy and Public Ethics (CAPPE) conducted a research project on ILPs which looked at complaints data and self-assessment forms. The study found that there was a positive correlation between firms reporting high levels of compliance with the OLSC's ten objectives and relatively low levels of complaints. Professor Seumas Miller and Mathew Ward, the authors of the study report, concluded that the findings indicate that "the self-assessment process is being taken seriously" and having "a substantial impact."

Following CAPPE's study, in 2008 Dr. Christine Parker of the University of Melbourne Law School conducted a study to assess whether the self-assessment process for ILPs is effective and whether the process is leading to "better conduct" by ILPs as evidenced by the number of complaints relating to ILPs. The study, which we have reported on in past issues of *Without Prejudice*, involved analysing the self-assessment forms of 620 ILPs. The study found that the NSW legislation requiring ILPs to implement appropriate management systems combined with the NSW OLSC's self-assessment regime for encouraging firms to actually put this into practice reduced complaint rates for ILPs by two-thirds.

To obtain more information on the relationship between self-assessment

and the ethical norms, systems, conduct and culture in firms, the OLSC together with Professor Susan Saab Fortney, Howard Lichtenstein Distinguished Professor of Legal Ethics, Hofstra Law School, commenced a research project in October 2012 to obtain objective data on firm approaches and experiences related to the self-assessment process and appropriate management systems, and their effect on practice. To obtain this information we invited legal practitioner directors of ILPs with two or more legal practitioners to complete an online questionnaire. A total of 141 of 356 firms completed the on-line questionnaire.

The research indicates that the self-assessment process had prompted a large majority of firms (84%) to revise and change their management and risk management systems. Beyond revising existing firm systems, policies or procedures, 47% reported that their firms actually adopted new systems, policies, or procedures. Large percentages also indicated that their firms strengthened firm management (42%) and devoted more attention to ethics initiatives (29%). Significantly lower percentages sought guidance from the OLSC (13%) or another person/organization. Only 6% hired consultants to assist in developing policies and procedures.

Lower percentages of respondents reported that they believed that the SAP impacted consideration of ethics issues. Forty-eight percentage of respondents indicated that they agreed with the following statement: "The SAP prompted firm directors to reflect on ethical conduct." Similarly, 44% of respondents indicated that they agreed or strongly agreed with the following statement: "The SAP enhanced my awareness of ethics issues." Twenty-three percent indicated that they disagreed (17%) or strongly disagreed (6%) with the statement. These results are consistent with other findings that suggest that larger percentages of directors perceive that the SAP and AMS requirements impact "client service matters" more than general ethics concerns.

The survey results also reveal that the majority of respondents recognize the value of requiring firms to implement and maintain AMS and self-assess their management systems. Respondents representing firms of all sizes reported that the SAP process had a positive effect on different aspects of firm practice, most notably firm management and risk management, followed by a positive impact on client service issues. For more information see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205301



OLSC'S NEW WEBSITE

Over the last six months we have been working on developing a new and improved OLSC website for the profession and the general public. The new OLSC website will retain all of the information that currently exists on the website but the information has been greatly expanded to make it easier for people to understand the role and function of our office, the complaints handling process, our research and the educational services we offer.

We are excited to announce that the new website will be launched on 22 May 2013. The new website address is <http://www.olsc.nsw.gov.au/>

PAPERS/SEMINARS

ETHICS SEMINARS IN FULFILMENT OF RULE 42 OF THE LEGAL PROFESSION ACT 2004 (NSW)

During March and April the OLSC presented numerous ethics and professional responsibility seminars to practitioners in fulfilment of the requirements under Rule 42 of the *Revised Professional Conduct and Practice Rules 1995 (NSW)*. Seminars were delivered to a range of organisations, law firms, in-house legal departments, regional law societies and government organisations.

EDUCATIONAL SEMINARS AT UNIVERSITIES

During March and April, the OLSC presented a number of seminars to students at universities across New South Wales. The seminars generally focused on the role and function of the OLSC, the *Legal Profession Act 2004 (NSW)* and co-regulation. In delivering the seminars OLSC staff discussed the most common types of complaints the OLSC receives and how we deal with those complaints. The seminars provide students with an understanding of the regulatory framework and complaints handling.

If you would like the OLSC to present a seminar at your firm please contact us on (02) 9377 1800.



WITHOUT PREJUDICE VIA EMAIL

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