

Without Prejudice

C L I E N T S A N D C O N D U C T

ISSUE 26 • THE OFFICE OF THE LEGAL SERVICES COMMISSIONER • NOVEMBER 2002



From Left to Right: Assistant Commissioner (Complaints) Jim Milne, Assistant Commissioner (Legal) Lynda Muston, Legal Services Commissioner Steve Mark

Ideas sought on measuring change

Being the last issue for 2002, it's a good time to mention some key projects the OLSC will be working on in the new year and beyond.

Similar to most regulatory and complaint-handling bodies, the OLSC is required to meet a number of quantitative performance indicators, such as those relating to complaint turnaround times.

I'd like to also have reliable qualitative data with which to measure the real effects of what we do amongst the profession and amongst consumers of legal services in NSW.

We're exploring possible projects to benchmark areas of change or improvement in the profession and for consumers. As part of this process, I encourage you to contact us with any suggestions you have as to how these changes can be measured.

Without Prejudice will return in late February with regular features included next year such as case notes of OLSC experiences, analysis of statistical trends, tribunal decisions and helpful hints for practices and consumers.

Until then, enjoy the festivities of the season.

Steve Mark
Legal Services Commissioner

Client instructions – do client's interests always prevail?

Some complainants to the OLSC say they were pressured by their practitioner to accept a settlement offer while others complain about opposing practitioners in family law matters who were allegedly inflammatory or personally insulting during the case.

While a practitioner must obey the client's instructions when acting for them, they also have a duty to the court and to the general community to act fairly and honestly. In doing so, the practitioner carefully considers the instructions and evidence of a client, taking into account the possibility that all evidence may not have been presented and that clients are not always entirely truthful. The practitioner cannot – however much the client desires it – become simply a 'mouthpiece' for the client's instructions.

A practitioner has a duty to argue the strongest possible case for their client. Adversarial systems such as ours mean the opposing side can be discredited and subjected to inflammatory and insulting remarks from the opposing practitioner during a trial, leaving them feeling they've been treated unfairly.

Practitioners in family law matters are often required by their client to seek a particular result which can be upsetting to the opposing client. Despite the fact that they are obliged to pursue that result as diligently as possible by way of

acceptable and lawful conduct, complainants to the OLSC have difficulty seeing that the practitioner is legitimately advancing their client's legal rights.

A practitioner also has a duty to act in the best interests of their client and to advance and protect their client's interests. A practitioner advising a client on a settlement offer must weigh up a number of matters over and above the simple monetary figure on offer. The practitioner must consider that costs can be awarded against a party who rejects a settlement. They must also consider whether or not to litigate when to do so may be an inefficient use of court time or ultimately prove fruitless.

These are just two of the instances where the OLSC emphasis on promoting more realistic expectations of the legal system among consumers and encouraging practitioners to communicate with clients about the progress of their matter, can play a major role in improving the quality of relationships between clients and practitioners.

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Getting what you asked for and understanding what you're told

The OLSC annual report reveals that complaints related to communication were the most frequently received in 2001-2002.

Poor communication is evident in other frequently received complaints, such as delay, not returning calls or letters or inadequately explaining issues, and can be avoided if consumers set some ground rules at the start, says Commissioner Steve Mark.

"We encourage consumers to consider making a 'communication agreement' when they are approaching a legal practitioner to act for them. We suggest people ask the practitioner a number of questions about communication at the outset to clarify things and hopefully avoid problems and the need for our Office to get involved," he says.

Consumers should seek answers to questions such as who in the practice will handle the matter? How can they be contacted and at which times?

It's also helpful to seek agreement from prospective practitioners to return telephone calls within 24 hours and to respond to correspondence within five working days.

"It's important too that consumers seek an undertaking that they be notified by the practitioner of any significant occurrences in relation to their matter within five working days," the Commissioner says.

They should also find out charges for the first appointment and the length of an appointment, seek explanations about the legal processes involved in their case, ask for regular progress reports and clarify how often to phone, who to phone and if costs will be incurred for phone calls. Consumers should seek guarantees from practitioners that they will be notified of any significant increases on the original estimates given for legal work.

"Research in the complaints area shows that lawyers who communicate well don't attract complaints and end up with more satisfied clients – even those who don't get the outcomes they expected," Commissioner Mark says.

Valuable approaches to determining costs

Time costing has been a defining element of the legal profession for over 50 years but the tide has steadily turned as more practitioners realise the benefits of value-based costing.

"Our experience and international evidence points to the fact that time-costing by lawyers is inefficient, encourages the perception of overcharging and is not satisfying to consumers who are just paying for the practitioner's time and not how they spend it," says Legal Services Commissioner Steve Mark.

Unlike time costing, value-based costing acknowledges that not all legal work is of the same value. It takes into account the degree of complexity, the predictability of results, and the effect on the client of exposure to loss.

More importantly, value-based costing involves the practitioner and client discussing at the outset the value of the legal work for the client and for the practitioner. Agreed-upon fees are then negotiated.

According to *Beyond the Billable Hour - an anthology of alternative billing methods**, value-based costing considers the importance of the matter to the client. It also considers consequences to the client of an unsatisfactory resolution.

Beyond the Billable Hour suggests value-based cost agreements place higher value on legal services provided to a client which enable the client to 'grow'. Such agreements negotiate greater value for legal work that results in the client obtaining something to which they are entitled or legal work that helps the client avoid risk.

Value-based costing requires forethought and planning on the

practitioner's part and can include practical policies such as offering a scale that includes reductions when additional time is needed to understand a new area of law. These costs agreements should be commenced only when the base cost is known and there is a clear idea of the numbers of hours involved and the fee required to cover these costs.

Additional factors that should be analysed when determining value include the number of people involved, their ability to pay and the effects on the practice of handling the matter.

* *Beyond the Billable Hour - An Anthology of Alternative Billing Methods*, Edited by Richard C Reed, American Bar Association, 1989

Consumers can now make informed choices

The OLSC's online disciplinary register is now live at www.lawlink.agd.nsw.gov.au/olsc1.nsf/pages/index

Provided for in the recently proclaimed *Legal Profession Amendment (National Competition Policy Review) Act 2002*, the Disciplinary Register records disciplinary action taken against legal practitioners in NSW. The register is expected to enhance consumer choice at the same time as reinforcing the importance of high ethical standards to the profession.



Online register will help consumers to choose.

Liens: My solicitor won't hand over my file!

The OLSC receives many complaints from people about solicitors who refuse to hand their documents over to them. In most circumstances however, the solicitor is claiming a 'lien' and it's likely they are entitled to do so.

What is a lien?

A lien is a right to keep possession of property belonging to another person until the debt due by that person is paid.

Solicitors can exercise a lien over property belonging to a client until outstanding fees are paid.

What kind of property can be held?

Solicitors usually claim liens over documents they have in their possession as a result of work undertaken for the client. However, "property" is not restricted to documents.

Property belonging to other parties cannot be retained as part of the lien even if the solicitor has it as a result of the solicitor-client relationship.

For example, passports can't be held under a lien because they are owned by the relevant Government, nor can title deeds where the property is owned by another party.

A solicitor is only able to claim a lien

over property owned by the client who owes the debt.

But my new solicitor needs the file...

Complaints about liens usually arise when the client is unhappy with the services of their solicitor and decides to take their matter to a new legal practitioner.

A solicitor cannot continue to exercise a lien where costs have been satisfactorily secured. Costs can be adequately secured by three-way agreements between the client, the old solicitor and the new solicitor. These three-way agreements are often referred to as *tri-partite deeds*. The client promises to ensure the monies owing to the old solicitor, as agreed or assessed, are paid at the end of the matter. Their new practitioner promises to inform the old solicitor of the progress of the matter and the old solicitor agrees to hand over the file. (Contact the Law Society of NSW for a standard form of this type of agreement.)

Is there any way around a lien?

Since solicitors have a right to maintain a lien where their costs remain outstanding, there are very few situations where a lien can be overturned.

In certain circumstances, the Legal Services Commissioner, the Law Society of NSW or the NSW Bar Association may waive a lien. The Commissioner has power to do this in circumstances where documents are required for the "orderly transaction of the client's business".

At first glance, "the client's business" might appear to refer generally to any dealings in which the client is involved. However, the meaning of "business" has been interpreted more narrowly. In a recent case, "client's business" has been taken to refer to activities related to professional undertakings or those of a commercial or corporate nature.

A client may also apply to the Supreme Court to have documents released.



Is a lien keeping your files locked away?

Information does not equal knowledge

Complaints of misleading the court are extremely difficult to establish but consumers involved in litigation often complain to this Office about opposing legal representatives whom they allege misled the court by either presenting false information or by not correcting false information provided by the opposing practitioner's client.

Allegations such as these need to distinguish between information that is simply *presented* to a practitioner and what the practitioner actually *knows*.

Simplistically, litigation arises because two parties disagree about certain facts: one party asserts one version of events, the other denies it or asserts a different interpretation. Both parties instruct practitioners to argue their version of events and it is the court that decides which version has the most evidence to support it.

Complainants often approach this

Office when they consider that the other party is not being honest and it appears the opposing practitioner is misleading the court because they are advocating for the version of events with which the complainant disagrees. But allegations of misleading the court or lying to the court assume that the practitioner knows something to be true (or false) and makes submissions to the court that are different from what they know to be true (or false).

In most, if not all, cases a practitioner's 'knowledge' of what occurred is limited

to what their client tells them. The practitioner may receive reports from independent parties and may be aware of what the other side says happened, but this only constitutes information. The practitioner was most likely not there at the time, making it difficult to establish what they actually know about the disputed events.

Concerns over the validity of information during a court case should be raised with the court which has the decision making power.

OLSC Fact Sheets

The OLSC has reviewed its Fact Sheets series and will be distributing these to consumers via our inquiry line, through Community Legal Centres and community centres over the coming weeks, providing useful plain English information on such things as costs disclosure, liens, deceased estates and settlement. A new Fact Sheet is now available on costs disputes resolution. Contact the OLSC Education Officer on 02 9377 1800 or 02 9377 1827 for copies or download them from www.lawlink.nsw.gov.au/olsc1.nsf/pages/factsheets

Tribunal decides fundamental failures breach standards

The Commissioner commenced proceedings in the Administrative Decisions Tribunal in 2001 against Mr James Veneris, a sole practitioner in Albury. The proceedings arose as a result of complaints investigated by the OLSC.

The first complaint was that Mr Veneris had delayed the transfer of a file for over nine months. The second complaint dealt with a number of issues including failing to act in accordance with instructions, misleading his client on a number of occasions as to the status of various matters and failing to respond to telephone calls. Additionally, the Commissioner initiated his own complaints in relation to Mr Veneris' failure to produce documents when directed to do so by the Commissioner and misleading the Commissioner.

The Tribunal noted that Mr Veneris had been reprimanded on two occasions previously in relation to similar allegations. The Tribunal formed the view that a solicitor "who is dishonest, who lies to his clients and who misled the Legal Services Commissioner, all of which are admitted by the practitioner, acts dishonourably and is guilty of professional misconduct ... A solicitor has a clear duty to act honestly and fairly in all dealings ... Practitioners have a duty to their clients. That duty requires practitioners to implement instructions in a timely manner; to return phone calls promptly; to respond to correspondence from fellow practitioners in an efficient manner and to act professionally."

The Tribunal, as a result of its finding that the practitioner failed in a fundamental way to adhere to the required standards of conduct when dealing with clients, determined that Mr Veneris was not a fit and proper person to be held out as a member of the legal profession and, accordingly, ordered that his name be removed from the Roll of Legal Practitioners.

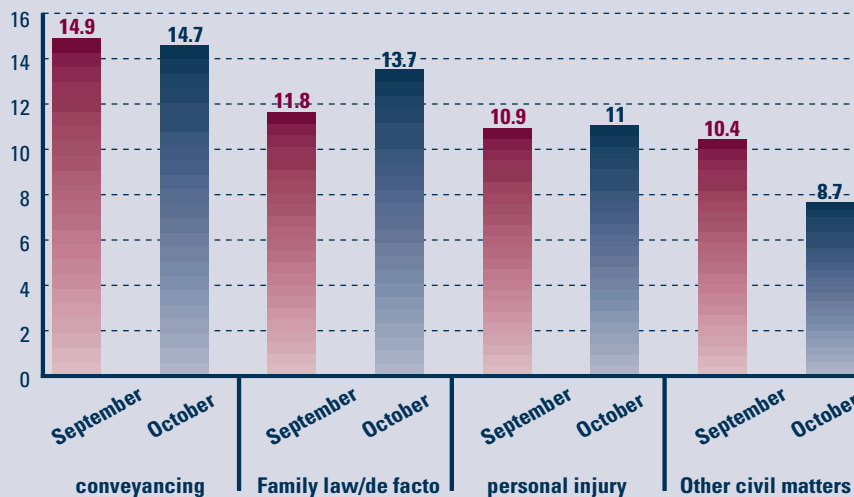
Phone inquiry line used regularly by consumers

The OLSC inquiry line took a total of 863 calls for September and 869 for October. The most commonly raised legal matters across both months were conveyancing, family law/de facto matters, personal injury, other civil

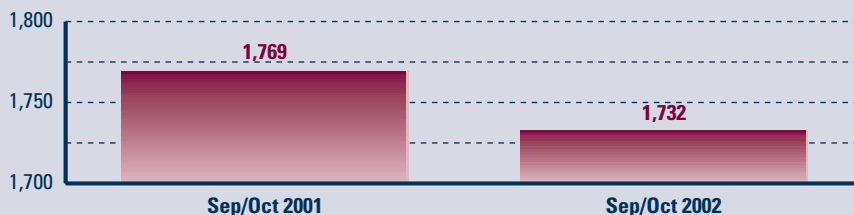
matters and wills. The most frequently raised issues of concern to callers were delay, quality of service, overcharging, rights to dispute bill, and bill inquiries.

The number of calls taken for September and October this year is 1732 compared to 1769 for the same period last year.

PHONE STATISTICS OVERVIEW FOR SEP/OCT 2002



CALLS TO INQUIRY LINE



There were nearly 40 less calls for Sep/Oct compared to last year.

Ambiguous costs advice resolved by phone mediation

Many complaints to the OLSC involve disputes over costs. In most circumstances we attempt to mediate these disputes to bring about a satisfactory resolution for both the client and the practitioner.

One recent example involved a client who was given a verbal quote for

\$500.00 by one of the clerks of a law firm and was confused when he received an invoice for a further \$200.00. Through a process of telephone mediation, the practitioner agreed to waive his fees and only charge for outgoing costs since he realised the advice regarding costs had been ambiguous.

This example is a good reminder that it is best to have agreements about costs in writing, even where cost are likely to be less than \$750.00.

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

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