

PROFESSIONAL CONDUCT – CAUTION

A complaint was made to our Office about the conduct of a legal practitioner who was appearing for a defendant in a criminal hearing before the Local Court. The complaint alleged that the legal practitioner communicated inappropriately with the police prosecutor, during a short adjournment in proceedings.

The alleged inappropriate communications consisted of a series of statements by the legal practitioner. The alleged statements included telling the police prosecutor that she was “a joke”. According to the complaint, the legal practitioner said to the female police prosecutor as follows:

“...I don't give a damn if you're qualified or not. For all I know you have qualifications in sheep husbandry. You look like you would be qualified in servicing a sheep.”

The allegation in relation to the police prosecutor having qualifications in sheep husbandry was supported by two court officers who had overheard that conversation.

The allegations of inappropriate communication were put to the legal practitioner. The legal practitioner denied making the statement that the police prosecutor was “a joke”. The legal practitioner did admit mentioning “sheep husbandry” and subsequently accepted that he made the comment that in effect stated that the police prosecutor looked like someone who was qualified in “servicing” sheep.

The legal practitioner accepted that the comment was inappropriate and that even though he was frustrated and annoyed, he should have refrained from making the comment in the “heat of the moment”.

On the basis of the evidence before him, the Legal Services Commissioner was of the view that regardless of whether the practitioner was frustrated or annoyed at the police prosecutor's conduct, it was not appropriate to imply that the police prosecutor should or could service sheep. This comment was made in an open Court in the presence of court officers.

The Legal Services Commissioner was satisfied there was a reasonable likelihood that the legal practitioner would be found by the Legal Services Division of the Administrative Decisions Tribunal (“the Tribunal”), to have engaged in unsatisfactory professional conduct but not professional misconduct as defined in the *Legal Profession Act 2004 (NSW (“the Act”))*.



In determining the appropriate disciplinary action the Legal Services Commissioner noted that the legal practitioner admitted he had made the comment “in the heat of the moment” and that the legal practitioner had had no adverse disciplinary finding against him. The Legal Services Commissioner also noted that the legal practitioner was willing to apologise to the police prosecutor.

The Legal Services Commissioner determined to caution the legal practitioner under section 540(2)(a) of the Act. Whilst a caution is not listed on the Disciplinary Register, it is recorded on the complaints record of legal practitioners and may be considered should the legal practitioner be the subject of any future complaint. Information relating to the caution is sent to the Professional Standards Department of the Law Society of NSW.

Comment

The duty of a legal practitioner to communicate appropriately with third parties in their practice of law, relates to the fact that a legal practitioner is an officer of the Court. The Solicitors Rules as issued by the Law Society of NSW, provide guidance as to the standard of communication that is expected for a legal practitioner.

Rule 25 of the Solicitors Rules provides 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.

Legal practitioners must take care in ensuring that their communications are courteous at all times, even when faced with stressful or difficult situations.

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SOCIAL MEDIA GUIDELINES

The OLSC recently received a complaint about a legal practitioner who had written on the “Facebook wall” of his client information about his Family Law Court proceedings, including details of his court file number.

According to the complainant, the legal practitioner made two entries on his client’s Facebook page. The first comment contained an apology for failing to advise the client on time and then stated, “Hope you enjoyed the court experience.” The second comment asked the client to telephone the Court and request his file. The comment stated the relevant file number. The comment also provided advice to the client about arrangements in relation to a child under the age of 18 years.

When the complaint was put to the legal practitioner, he stated that he wrote the message to his client on Facebook because he was not able to contact his client by telephone and was concerned that his client would miss his Court appearance. The legal practitioner also stated that he believed that his message was a private message and that this would not be accessible by anyone else.

In Family Law matters, Section 121 of the *Family Law Act 1975 (Cwth)* makes it an offence if a person publishes any part of any proceedings under the *Family Law Act 1975*.

The Legal Services Commissioner was of the view that the messages posted on the legal practitioner’s client’s wall had divulged information about the client’s proceedings in the Family Court. It provided the phone number of the Family Law Court and the client’s reference number. Of particular concern was the reference to a “child under 18”. This would advise any person reading that message that the client’s court matter relates to a child. Bearing in mind the restrictions in publishing Family Law proceedings and the contextual sensitivity of the client’s matter, the Legal Services Commissioner held that it was incumbent on the legal practitioner to take a particularly high degree of care to ensure his client’s confidentiality.



The Legal Services Commissioner held the view that the legal practitioner was reckless in writing on his client's Facebook wall to communicate with him about his Family Law matter. It was the Legal Services Commissioner's view, that the practitioner was not sufficiently satisfied and confident in using the Facebook functionality to communicate in a way that would ensure client confidentiality. Doing so breached the legal practitioner's professional obligation to maintain his confidentiality.

The Legal Services Commissioner was of the view that there was a reasonable likelihood that the legal practitioner would be found by the Legal Services Division of the Administrative Decisions Tribunal ("the Tribunal"), to have engaged in unsatisfactory professional conduct, but not professional misconduct as defined in the Act.

The Legal Services Commissioner determined to caution the legal practitioner under section 540(2)(a) of the Act given that the legal practitioner had misunderstood the concept of a Facebook wall, that he had had no prior disciplinary action against him and that he expressed a unreserved apology for any embarrassment that his client suffered due to his Facebook "friends" discovering he had Family Law proceedings.

Comment

It is common knowledge that Facebook is primarily a social networking service that allows a Facebook user to maintain contact with, and pass information onto, various "friends". These "friends" can include family members, as well as personal and professional contacts. Social media sites like Facebook are increasingly being used as a communication tool by legal practitioners today.

Legal practitioners using social media must be very careful to ensure that they do not breach the rules of professional conduct. A legal practitioner's fiduciary obligations to their client inherently require maintenance of confidentiality of client information unless otherwise authorized.

The OLSC has developed a practice guideline for legal practitioners wanting to use social media. We would advise all legal practitioners to read and understand the guideline. The guideline is available on the OLSC's website at http://www.olsc.nsw.gov.au/olsc/olsc_education/olsc_education_guidelines.html

THE OLSC INQUIRY LINE – GROWING FROM STRENGTH TO STRENGTH

In July 1994 the OLSC opened its doors ready for business and soon after launched its Telephone Inquiry Line, enabling complainants to speak directly to an OLSC staff member. The purpose of the Inquiry Line was to not only take calls from the public but also to provide a mechanism by which complaints could be assessed and where determined to be "consumer disputes", resolved through mediation.

The OLSC's power to mediate consumer disputes arose from a recommendation by the NSW Law Reform Commission in 1993 that if a complaint does not raise issues of unsatisfactory professional conduct or professional misconduct, it should be mediated. The 1993 Report marked the culmination of an in depth inquiry into the then existing system for handling complaints against legal practitioners in NSW.

The recommendation by the Law Reform Commissioner for mediation of consumer disputes recognised the need for a fundamental shift in the way complaint handling bodies traditionally dealt with complaints. That is, the traditional system of handling complaints against lawyers did not serve the needs of complainants, the profession or the general public as 90% of failed to result in disciplinary action against the legal practitioner and were dismissed. As the Legal Services Commissioner stated in the first OLSC Annual Report,

"This shift is from an exclusively discipline based model to one which also recognises the need to address the dissatisfaction experienced by the consumer which is often not resolved by simply disciplining the legal practitioner."



During the first 12 months of operation the Inquiry Line, staffed by one employee took 6,700 calls. Of those calls to the Inquiry Line, the OLSC received 2,801 written complaints. During this period the OLSC conducted over 400 mediations. In its second year of operations calls to the OLSC's Inquiry Line increased by 31% and written complaints slightly reduced.

The slight reduction in written complaints and 31% increase in telephone inquiries indicated that the OLSC's strategy of assessing people over the phone through the provision of information and informal mediations led to a reduction in the number of written complaints.

Today, the OLSC Inquiry Line continues to be the first point of contact for many complainants seeking information, advice or assistance regarding complaints about legal practitioners. In addition to providing these services the Inquiry Line has also continued to conduct telephone mediations to assist in the resolution of complaints.

The Inquiry Line Service offered by the OLSC has assisted many many complainants over the years understand their rights, clarify points in dispute and resolve consumer disputes quickly and easily. Our model has now been replicated in other jurisdictions within Australia as a prototype for the effective resolution of disputes.

PAPERS/SEMINARS

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

During May and June 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 May and June, 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.



WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* to you via email. If you would like to receive *Without Prejudice* electronically please contact us at OLSC@agd.nsw.gov.au

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at Tahlia_Gordon@agd.nsw.gov.au



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