

DISCIPLINING 'FREQUENT FLIERS'

By Steve Mark
Legal Services Commissioner

Over the past few months I have become increasingly concerned about the number of practitioners who are the subject of frequent inquiries or complaints, which individually could not result in disciplinary action but demonstrate a distinct pattern of inappropriate conduct. Such conduct for example may include a practitioner who misleads his clients on a number of occasions over a span of years but never to a degree on any one occasion to amount to professional misconduct or unsatisfactory professional conduct, or a practitioner who is the subject of separate complaints concerning a failure to return telephone calls over a period of time. This pattern of inappropriate conduct is known as 'course of conduct' and is distinct from the conduct of a repeat offender who is disciplined on numerous occasions.

In most circumstances, inappropriate conduct by a practitioner involves an isolated act or omission. An investigation of a practitioner our Office, the Law Society or the Bar Association, is often enough to ensure the practitioner's future compliance with the NSW Professional Conduct and Practice Rules ('the Rules'), the Regulations and the provisions in the *Legal Profession Act 2004* ('LPA 2004'). Some practitioners, however, do not change and repeatedly engage in conduct in contravention of the Rules, the Regulations and the LPA 2004. Sometimes the conduct warrants sanction in one form or another but often the

conduct is of such a minor nature that the standard set by the LPA 2004 obliges our office to dismiss the complaint as there would be no likelihood that the individual offence would see the practitioner found guilty of unsatisfactory professional conduct or professional misconduct in the Administrative Decisions Tribunal.

Our statistics reveal that over the past three years, at least 50 practitioners have had 10 or more complaints lodged against them. Whilst a number of these practitioners have been disciplined either by reprimand or caution for their conduct, some have escaped sanction because

the individual complaint detailing their inappropriate conduct did not in and of itself warrant disciplinary action.

This is largely because in NSW each complaint is dealt with individually and each complaint stands or falls on its own merits. Previous sanctions are only considered when determining a penalty. Previous complaints are not considered. So if the OLSC is faced with a single complaint alleging failure to return telephone calls, the OLSC is unable to use the practitioner's history, which may indicate whether the practitioner has been the subject of other similar complaints.

DISCIPLINING 'FREQUENT FLIERS' (CONTINUED)

Consequently that practitioner will not be disciplined for the inappropriate conduct even though it may have been the 8th complaint alleging a failure to return telephone calls within a few years.

Several years ago a number of jurisdictions in the United States recognised this predicament and began to question whether and how they could institute a system that would allow them to account for the entire history of the practitioner's conduct including multiple complaints.

In Massachusetts the Board of Bar Overseers/Office of the Bar Counsel approached the problem by instituting a screening process whereby investigation files are opened for minor complaints if there is a history of complaints by a practitioner. The file is referred to a disciplinary counsel for further investigation no matter how minor the complaint. In deciding whether to refer a matter to disciplinary counsel, the Board of Overseers will also take into consideration exactly how many complaints have been made concerning the practitioner. Disciplinary counsel is entitled to hold the minor complaints open for several months to see if more complaints come in. The Board of Overseers and the Supreme Judicial Court of Massachusetts consider the cumulative effect of several violations in determining the sanction.¹ As the Supreme Court of Massachusetts commented:

"The respondent also argues that the imposition of a suspension on the basis of the cumulative effect of,

*as he characterized them, 'little tiny matters,' is a "radical departure" from other disciplinary cases. The simultaneous consideration of separate violations, is an established part of the disciplinary system of this Commonwealth.... We conclude that consideration of the cumulative effect of several violations is proper."*²

Arkansas has also contemplated instituting a system to deal with a practitioner's entire history including complaints. The system suggested would be similar to the drivers licence point system that takes into account the accumulative weight of all the practitioner's history over a certain time period. The proposed system would operate on the basis of a 9-point scheme as follows:

- (a) a practitioner who receives a warning letter would lose 1 point;
- (b) a practitioner who receives a caution would lose 2 points;
- (c) a practitioner who receives a reprimand would lose 3 points; and
- (d) a practitioner who receives a suspension would lose 4 points.³

The warning letter would be used to address those minor complaints that amount to inappropriate conduct. So, if a practitioner was sent a warning letter nine times during their career history they would face the possibility of losing their practising certificate or being suspended. For practitioners who have received warning letters and have been sanctioned the system would operate for example as follows:

*"Lawyer A, since 1983, four cautions (eight points) and five reprimands (fifteen points), for a total of 23 points but never suspended; Lawyer B, since 1987, two warnings (two points), four cautions (eight points), and three reprimands (nine points), for a total of nineteen points, but never suspended; Lawyer C, since 1982, has had four warnings (four points), three cautions (six points), ten reprimands (thirty points) and a six month suspension in 1992 and a three month suspension in 2000 (eight points) for a total of forty-eight (48) "career" points. Somewhere in these records is a possible need for more deterrence than the present system appears to deliver for repeat offenders who do not appear to correct their behaviour."*⁴

The conduct outlined above is based on the actual conduct of three practitioners in Arkansas. Obviously the behaviour of the above practitioners is at the extreme, but it is not an unfamiliar scenario for regulators in the United States or in New South Wales.⁵

The different approaches outlined above are indeed food for thought. The OLSC is very interested in seeking your comments about how regulators should deal with 'frequent fliers' in the legal profession.

Please send your comments to
OLSC@agd.nsw.gov.au

⁴ Ibid.

⁵ According to Leslie Levin, there is significant recidivism among lawyers in the United States and there is also evidence of recidivism among lawyers who have been disciplined in Queensland: see L. Levin, "Building a Better Lawyer Discipline System: The Queensland Experience", 9 Legal Ethics 2 at 205.

¹ Paper by C. Vecchione, 'Time and Time again: Dealing with Recidivists in the Massachusetts Bar Discipline System', Plenary Session, 9 February 2005, National Organisation of Bar Counsel at p. 9.

² *Matter of Saab*, 547 N.E.2d 919 (Mass., 1989)

³ Paper by S. Lygon, R. Saltzman, S. Morrill & C. Vecchione, "Dealing Effectively with Frequent Fliers", Plenary Session, 9 February 2005, National Organisation of Bar Counsel at p.4-5.

SLATER & GORDON LIST ON THE ASX

On 21 May this year Slater & Gordon made legal and corporate history when it became the first law firm in the world to list on the Australian Stock Exchange. The firm has more than 95 million shares on offer and another 12 million non-voting shares. Shares in the firm, issued at \$1, closed at \$1.40, on volume of 8.2 million on the first day of trading. Slater & Gordon's managing director, Andrew Grech and fellow director Peter Gordon hold more than 14 million shares each.

While it may be the first, Slater & Gordon will not be the last law firm to float. Perth's Integrated Legal Holdings lodged a prospectus with the Australian Securities and Investments Commission. It hopes to raise \$12 million that will be used to buy legal practices.

CIVILITY CONTINUED

Following WP's previous article (February 2007) on civility we bring you the latest from the United States: -

A Chicago lawyer was recently disciplined whilst appearing in the U.S. Bankruptcy Court for the Southern District of Florida for saying the following to the bankruptcy judge:

"I suggest with respect, your honor, that you're a few french fries short of a Happy Meal in terms of what's likely to take place."

THE OLSC IS MOVING PREMISES

In October this year we will be moving office from the Goodsell Building in Chifley Square to 75 Castlereagh Street, near King Street. Our move is a direct result of the relocation the Attorney General's Department from the CBD to a new corporate headquarters at Parramatta known as the 'Parramatta Justice Precinct.'

The Parramatta Justice Precinct is a state-of-the-art purpose built complex for the 21st century. The Precinct features the first State Government buildings constructed to a 5-star environmental rating. The Precinct is located on the corners of George, Marsden and O'Connell Streets and across the road from Parramatta Local Police and the Parramatta Courthouse. The Precinct is a 10-15 minute walk from the Parramatta railway station and bus interchange, and a 5-10 minute walk from the Parramatta ferry wharf.

Those business centres moving to Parramatta include:

- Aboriginal Justice Advisory Council;
- Births Deaths & Marriages Shopfront;
- Community Justice Centre Directorate/Operations;
- Corporate Human Resources;
- Community Relations Division;
- Corporate Services Division;
- Crime Prevention Division;
- Diversity Services;
- Finance and Strategy;
- Information Services Branch;
- Information Services Branch – Support Contractors;
- Legal Management Services;
- NSW Privacy;
- Office of the Protective Commissioner;
- Office of the Public Guardian;
- Professional Standards Council;
- Victims Services.

In addition to the Attorney General's Department the Precinct will also include: the NSW Children's Court at Parramatta, housing six criminal and other courtrooms; the Sydney West Trial Courts complex, housing nine trial courts; the Department of Health and some commercial development. Other justice related agencies, such as the Legal Aid Commission and the State Parole Authority, will also become tenants in the office complex.

Further updates on our, and the Departments' move will be included in upcoming issues of Without Prejudice.

OLSC STATISTICS – MAY MADNESS !

May 2007 was an extremely busy month at the OLSC. The OLSC's inquiry line took an astounding 828 Inquiry line calls in May 2007 as compared to 601 calls the previous month.

The most frequently raised legal matter during May was family/defacto matters at 19.4% representing an increase of 2.1% from 17.3% received for the month of April. This was followed by conveyancing at 15.5% and other civil matters at 14%.

Consumers complained mostly about communication during May 2007 at 45.2% followed by costs at 32% and negligence, which rose 4.9% from 23.5% in April to 28.4% in May.

There was also a considerable increase in the number of written complaints in May 2007 (269 written complaints) as compared to 210 written complaints in April 2007.

COMING UP

The next edition of *Without Prejudice* will focus on recent disciplinary proceedings in the Administrative Decisions Tribunal, as well as substance abuse and mental health issues within the legal profession.

WITHOUT PREJUDICE VIA EMAIL

As indicated in our last issue the OLSC will send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email and haven't already let us know please contact us at OLSC@agd.nsw.gov.au

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



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