THE COMPLAINTS PROCESS AND OTHER ETHICAL ISSUES FOR FAMILY LAWYERS

By Gavin Howard, Barrister

Introduction

1. One might ask why there would be a paper specifically on ethical issues for Family Lawyers. Well, the most obvious answer is that, as a practice group, Family Lawyers consistently receive more complaints against them than any other lawyers. In each State and Territory (with the exception of the Northern Territory) the percentage is just under a quarter of all complaints being made against family lawyers. In NT we are just the second most complained about practice group.

2. My intention is to provide a summary of the complaints process given the relatively high likelihood that a complaint is likely to be made against you as a family lawyer. I will also then address some specific issues that have arisen in recent cases either in ACT or NSW. For that purpose, I have reviewed recent decisions in the ACT and NSW relating to discipline of legal practitioners.

3. I have been a member of the ACT's Professional Standards Committee (formerly Complaints Committee) since 2013. That committee has delegated power from the Law Society Council to investigate complaints made against solicitors and to dismiss complaints if they have no merit or to otherwise make recommendations to the Council about the way in which a complaint should be dealt with.

4. Complaints about family lawyers are as often made by the other party as they are by the lawyer's own client. It is rare that lawyers make complaints about other lawyers, but it does happen. Even rarer situations are where a court makes a referral to the Law Society or Bar Association about a practitioner, or the Society brings its own complaint.

5. The areas that I intend to address are:

    a. The complaints process;

b. Making serious allegations;

c. Inappropriate behaviour within the workplace; and

d. A summary of some other cases from ACT & NSW.

THE COMPLAINTS PROCESS

6. When a complaint is made about a solicitor, the process for consideration of the complaint is:-

   a. If the complaint relates to conduct more than 3 years prior to the complaint, then a determination needs to be made pursuant to section 395 of the Act;

   b. Assess whether the complaint should be investigated or whether it can be dismissed pursuant to section 399 of the Act;

   c. If the complaint is to be investigated, the complaint will be forwarded to the solicitor for them to provide any response to the complaint;

   d. After receipt of the solicitor's response, a member of the Professional Standards Committee will review the complaint and the response and report at a meeting of the committee;

   e. The Professional Standards Committee can dismiss the complaint pursuant to section 399 of the Act or make recommendations about other courses available;

   f. If there is some merit to the complaint, but it is considered that there is no reasonable likelihood that the practitioner would be found guilty of misconduct by ACAT, then the complaint can be dismissed pursuant to section 412;

   g. If there is a likelihood that the practitioner would be found guilty of misconduct than the Law Society Council can summarily conclude the complaint by imposing some conditions or penalties pursuant to section 413;

   h. If the complaint is more serious, and it is considered that a finding of guilt is likely, then the matter will be referred for the commencement of proceedings in ACAT.

7. In the above section I have used the generic term “misconduct” when considering the guilt of a practitioner in relation to a complaint. Just as a reminder, there are 2 categories of misconduct under the legislation.

8. **Unsatisfactory professional conduct** - Section 386 defines "unsatisfactory professional conduct" to include “*conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner*.”

9. Professional misconduct - the definition of professional misconduct is set out in section 387. It should be noted that the common law definition of professional misconduct is broader and can apply, but generally speaking the definition within the Act is the one that is applied.

387 . What is professional misconduct?

(1) In this Act:

"professional misconduct" includes—

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

*(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate***.**

10. Section 389 then sets out some specific examples of conduct that can be unsatisfactory professional conduct or professional misconduct.

11. If the complaint relates to conduct more than 3 years prior to the complaint then the complaint can only be considered if "*it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay or the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint*." This decision can only be made by the Council, although the Professional Standards Committee can make recommendations.

12. Complaints can be dismissed pursuant to section 399. Effectively this section is about complaints that have no merit – complaints that are "*vexatious, misconceived, frivolous or lacking in substance*".

13. The best type of complaint to receive is the one where the complaint is dismissed prior to you learning of its existence. This means that, even on the face of the complaint at its highest, there is no basis to consider that any misconduct has occurred.

14. Once the response from the solicitor has been received, and after review by a committee member, the complaint can then also be dismissed pursuant to section 399.

15. The less ideal, but still okay, outcome is where the complaint is dismissed pursuant to section 412. In this instance, it is considered that there is some merit in the complaint or some reason for concern about the solicitor's conduct but that it is unlikely that a finding of guilt could be obtained in ACAT. This is usually about evidence.

16. If there is merit to the complaint and it is considered that it is likely that the solicitor would be found guilty of misconduct, then either the Council can summarily deal with that pursuant to section 413 or can make an application pursuant to section 419 for the practitioner to be dealt with.

17. If a complaint has been made about you, then you need to be aware of your obligation to the Society. The Solicitors' Conduct Rules set out clearly your obligation to the Regulatory Authority

> 43.1 *Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.*

43.2 *A solicitor must respond within a reasonable time and in any event within 14 days … and in doing so the solicitor must furnish in writing a full and accurate account of his or her conduct in relation to the matter.*

18. In one of the ACT cases this year, a matter that was considered relevant to penalty was the complete lack of contrition or acceptance of responsibility of the behaviour of the solicitor prior to the matter coming before ACAT for penalty. If, even in hindsight, you can see that something in your behaviour was not appropriate, then you should make appropriate concessions in your response.

MAKING SERIOUS ALLEGATIONS

19. It is often the nature of our work in Family Law that we are required to make quite serious allegations against the other party, either in submissions or in affidavits or other documents. Part of our duty as a lawyer is an obligation to be fearless and to put forward all arguments that are reasonably open in order to assist our client's cause. This includes, if appropriate, making allegations of impropriety or other improper conduct. There are some competing obligations in the Uniform Conduct Rules relating to this.

20. Rule 17 deals with our obligation to not be the mere mouthpiece of our client. Lawyers are required to exercise their forensic judgement to determine what matters of evidence should be adduced and what submissions should be made. The rule however recognises that a lawyer is entitled to robustly advance the client's case, but it is expected that the lawyer will confine hearings to matters which are the "*real issues*" in a case. This has also been emphasised in the Rules of the FCFCOA[1].

21. Rules 17.2 specifically provides a defence to any complaint by a client that you did not follow instructions because of the focus on the real issues[2].

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[1] Central Practice Directions – Core Principle 8 – Identifying & Narrowing the Issues in Dispute

[2] *A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:*

17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;

17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or

17.2.3 inform the court of any persuasive authority against the client's case.

22. Part of the reason for an advocate's immunity from suit is that an advocate is required to limit the case to the "*real issues"* and in doing this may have to disregard some of the arguments that a client would like to be brought[3].

23. This issue is brought into sharp focus in relation to the making of serious allegations by lawyers. Rule 21 provides restrictions on the circumstances in which lawyers can make allegations on behalf of clients. It is important to set out this rule in full.

> ***21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:***
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> ***21.1.1 is reasonably justified by the material then available to the solicitor;***
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> ***21.1.2 is appropriate for the robust advancement of the client's case on its merits;***
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> ***21.1.3 is not made principally in order to harass or embarrass a person; and***
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> ***21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.***
>
> ***21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:***
>
> ***21.2.1 are reasonably justified by the material then available to the solicitor;***
>
> ***21.2.2 are appropriate for the robust advancement of the client's case on its merits; and***
>
> ***21.2.3 are not made principally in order to harass or embarrass a person.***
>
> ***21.3 A solicitor must not allege any matter of fact in:***
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> ***21.3.1 any court document settled by the solicitor;***
>
> ***21.3.2 any submission during any hearing;***
>
> ***21.3.3 the course of an opening address; or***
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> ***21.3.4 the course of a closing address or submission on the evidence, unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.***

[3] *Giannarelli v Wraith* (1988) 165 CLR 543 where the High Court specifically refers to clients wanting counsel to chase every rabbit down its burrow and that counsel should not be criticised for not doing so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out

24. Essentially a lawyer must not make serious allegations against any person unless:

    a. The allegation is reasonably justified on the evidence available;

    b. The allegation is appropriate for the robust advancement of the client's case;

    c. The client wants the allegation to be made having been advised of the seriousness of the allegation and the possible consequences if the allegation is not proven

    d. The allegation is not made principally in order to harass or embarrass the person; and

    e. The allegation is not made principally in order to gain some collateral advantage out of court.

25. Before making a serious allegation against anyone a solicitor must first ensure that the evidence then available supports the case that the allegation is true. That is, there must be a good arguable case based on the evidence that you already have, that the alleged behaviour has occurred. Notably, it is required that the relevant proof is already available and not that it might arise during cross examination.

26. Representing a party under a section 102NA order can present particular difficulties with this rule. Always remember that you are not the mere mouthpiece of the client and that you must not make allegations unless they are sufficiently proven on the material in front of you. In a case under s. 102NA I was presented with a client who had made multiple allegations about

the mother's new husband assaulting the mother. There was some evidence available of one possible assault but no helpful evidence about any others (all were based on gossip within the relevant community). As a result, the client was upset that only the one allegation could be explored in cross examination.

27. Even if the evidence provides a good arguable case for the allegation, a solicitor still must not include an allegation in the material presented to the court unless the allegation is relevant and important to the case that they are trying to make out. Allegations which are not relevant to the issues in the case should not be made. Examples of this might include an allegation of Centrelink fraud in a parenting case or an allegation of inappropriate disciplining of children in a property case.

28. It is not uncommon for allegations of assault to be made in property matters. This may be justified if a *Kennon* claim is being made but is otherwise not generally relevant. If you are going to pursue a *Kennon* claim on behalf of your client, then you need to do more than just set out allegations of assault. You need to carefully consider whether making the allegations will likely lead to a relevant finding. If not, you should not include the allegations. I note that this may change if the current FLA Amendment Bill (No. 2) 2023 is passed in its current form.

29. Even if there is evidence that supports a serious allegation in the case and raising the allegation is relevant and helpful to your client's case, a solicitor still has an obligation to discuss with the client whether or not the allegation should be made. Documents should not be prepared raising serious allegations unless, inter alia, the solicitor has advised the client of the seriousness of the allegation and the possible consequences for the client if the allegation is not made out and, notwithstanding that advice, the client still wishes the allegation to be made.

30. The leading case on the issue of making serious allegations without foundation remains *Clyne v New South Wales Bar Association*[4]. In that case a barrister made serious allegations against the solicitor acting for a wife in family law related proceedings in his opening to the Court. He effectively alleged that the solicitor was keeping the proceedings going against his client in order to benefit personally by the costs that he would recover later. He also alleged that the

[4] (1960) 104 CLR 186

solicitor had allowed his client to sign an affidavit knowing that it was false. The High Court considered these allegations to be of the grossest possible professional dishonesty. The allegations were neither required for the robust advancement of the client's case nor capable of proof.

31. There has been at least one complaint in the ACT (not Family Law related) in the last few years very similar to the case of *Clyne*. In that case a written submission filed by a solicitor (but drafted by a barrister) directly suggested that the solicitors acting for the other party were drawing the case out deliberately in order to receive more fees despite knowing that the case was hopeless. The fact that the solicitor did not draft the submission did not mean that they were not subject to possible sanction. Solicitors are required to exercise their own judgment in relation to such matters. However, the result was a less serious outcome given that the submission was drafted by counsel.

32. A barrister in Queensland was sanctioned as a result of his submissions in a Family Law matter[5]. The trial judge had referred the matter to the relevant authority. He had asserted, based just on his clients say so, that the parties were never married and that the husband had committed a fraud on the court in filing the marriage certificate that he did. The parties had been together from 1974 and, after the separation, the husband obtained a divorce (uncontested) in the then Family Court. Of course, part of that decision has to be a finding by the court that the parties were married. Essentially there was a marriage certificate from Iran and the barrister alleged that the translation of this document was incorrect although he did not have his own supposedly correct translation. The barrister needed more than just his client's word that this document was fraudulent.

33. A barrister in Sydney was struck off as a result of making serious allegations that he could not prove and knew at the time that he could not prove.[6] Similarly to *Clyne*, he made serious allegations against the solicitor for another party. That solicitor was actually joined as a party to proceedings in the NSW Supreme Court. He alleged that the solicitor had, amongst other things, aided and abetted his [the solicitor's] client in breaching the client's obligations under section 181 of the Corporations Act (discharge of directors' duties in good faith and for a

[5] *Legal Services Commissioner v Wrenn* [2020] QCAT 210
[6] *Council of the NSW Bar Association v de Robillard* [2023] NSWCATOD 75

proper purpose). He had no evidence to support that allegation. The barrister sought to defend his decision to make the allegations and said that the evidence that he did have led him to have a "gut feeling" that the solicitor had overstepped his role. The vibe didn't cut it as a defence to the complaint.

34. The issue of family violence allegations raises some particular difficulties. Obviously, family violence allegations are raised in a significant proportion of family law cases. The potential difficulty arises because it is not unusual for such violence to occur in private and without other witnesses. If your client gives you instructions about family violence then, at least in a parenting matter, it is likely to be relevant and important and should be included even if the only evidence available is the evidence of the client. Of course, if you can find other evidence then that's always welcome, but it isn't always available.

35. The point is that you won't fall foul of this rule if you include allegations made by your client of family violence merely on the basis that the only evidence you have is that of your client. I suggest, however, that only allegations that are made with at least some particularity should be included. The number of times that allegations are wholly set out in words like "He assaulted me during the marriage" without more is unhelpful.

36. Even if there is no complaint made to a relevant Regulatory Authority, the making of an unfounded or irrelevant allegation can sound in costs, and often indemnity costs, against the client or against the relevant lawyers[7].

ISSUES ARISING FROM RECENT CASES IN NSW & ACT

37. In this section I will just go through some recent cases that have been determined in the ACT and NSW. It should be remembered that the cases that make their way to the Tribunal or to a Court are at the worse end of the scale of misconduct. It can always be helpful though to look at the behaviour that practitioners are getting into trouble for.

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[7] *Hennessy Building Pty Ltd v Pryce* [2022] FCA 198; See also *Colgate-Palmolive v Cussons Pty Ltd* (1993) 46 FCR 225 - *Making allegations of fraud, knowing them to be false, and the making of irrelevant allegations of fraud are grounds for indemnity costs orders*

38. One thing I discovered while working my way through the NSW cases was that there are a significant number of cases involving practitioners who have been convicted of serious criminal offences. I will not be going through those matters today, but over the last few years practitioners in NSW have been disciplined after being convicted of things like:-

    a. Misappropriation of almost $1 million from trust account;
    b. Armed robbery - in fact this solicitor had just got out of jail for a prior sentence for armed robbery when he committed a further armed robbery. He was struck off for the latter and not the former.
    c. Misappropriating funds from companies that the solicitor worked with totalling almost $10 million.
    d. Using the identity details of other people (including the solicitor's ex- husband) and signing false declarations to have traffic fines issued to her ex-husband and a client rather than to her son or her father.

39. In all the above cases the solicitor was struck off.

INAPPROPRIATE BEHAVIOUR IN THE WORKPLACE

40. I am going to look at 2 cases where the "culture" of the workplace was used as either an excuse or at least an explanation as to why certain behaviour, that was later determined to be professional misconduct, had occurred. Both of them are fairly notorious.

41. I will deal with a Canberra case first. Before I do, I should note that there is a difference of attitude to the naming of practitioners involved in disciplinary proceedings. It seems to be common practice in NSW for practitioners to be named in virtually every case. In the ACT however, practitioners are generally not named initially although they may eventually be named once appeal periods have ended.

42. In the case that I am going to address, the decision of the tribunal was a public reprimand. As a result, the decision has been reported in the Canberra Times, amongst other places, and his name has been included in the publicly available decision on this matter. The Canberra Times

have also had reports of other matters relating to this practitioner. I do not intend to speak on any of those other matters. The decision I am talking about is Council of the Law Society of the ACT v LP 182022 (Benjamin Aulich)[8].

43. Before outlining the behaviour that ultimately led to a finding of professional misconduct against the practitioner, I will review what the practitioner said about the culture of his firm and why, initially at least, he maintained that there was nothing inappropriate in his behaviour. I should point out that ultimately he accepted that his conduct constituted professional misconduct and the matter was before ACAT simply in relation to penalty.

44. The tribunal considered that the 1st response from the practitioner was an example of him coming out swinging. Some parts of his initial response include:-

"We do not shy away from the unusual culture at [the Firm]. *We are unashamedly not like other law firms or public-sector workplaces that are often conservative, that frown upon office "banter" and that do not allow swearing or joking around.*

"… we tolerate humour and frivolity which may be too ribald for other law firms … [but] we do not tolerate humour which targets or intimidates individuals."

45. Ultimately, in his later responses to the society, he indicated that, "*on proper reflection, I think I can say that my desire to be an unconventional, fun, non-stuffy and non-conservative law firm and allowing staff to "let off steam" has clouded my judgment as to what is acceptable and what is not, particularly in light of my role as a senior practitioner and partner."* With that newfound insight into his behaviour, he had organised a complete review of the culture of the firm conducted by an external private company.

46. The behaviour that the practitioner engaged in occurred at a CPD event held by his firm at a farm in NSW. A lot of what occurred was videoed, with the video available to the tribunal. Initially the behaviour was raised with the society by a, by then, former employee who was clearly present at the event and indicated a level of distress at the behaviour.

[8] [2024] ACAT 43 (26 June 2024)

47. Perhaps the 1st lesson to be learned is that even if inappropriate behaviour is tolerated by some, it is likely to be much less well received by others. We need to be conscious of the possible impact of our behaviour on others.

48. The question then is what was the behaviour that ultimately led to the practitioner conceding that his own behaviour was professional misconduct overall. At the CPD weekend the following things occurred which, collectively, were found to be professional misconduct:-

    a. A card game was being played and one of the cards instructed "*the oldest person at the table to remove his/her pants."* The practitioner was the oldest person at the table and, after some urging by other players, he ultimately lowered his jeans at which some of his employees tackled him to the ground and one of the women tried to take his jeans from him. The practitioner thought it was all humorous as did some of the other participants.

    b. Later on the same evening the practitioner "*performed a cabaret-style dance in front of those present. … [He] performed the dance whilst shirtless, wearing suspenders and holding a rose between his teeth. During the dance, the legal practitioner behaved in a bawdy manner*."

    c. During the CPD event the following day, one of the employees circulated a colouring book containing demeaning and sexualised words regarding the practitioner and the firm. The practitioner did not have a role in preparing the colouring book, but he took no steps to confiscate it or to "admonish" the employee who circulated it.

49. Effectively the practitioner pleaded guilty to a breach of Solicitors Conduct Rule 5 in that he accepted that he engaged in conduct that is likely to bring the profession into disrepute.

50. As I have said, ultimately the practitioner accepted that, in combination, the above behaviour constituted professional misconduct. He was not struck off as a result of this conduct. The decision of the tribunal was that he be publicly reprimanded, pay a fine of $20,000 and also pay the Society's costs.

51. The other case under this heading that I will address had been the subject of a non-publication order, but that order was lifted after the Barrister was found guilty of professional misconduct[9]. The complaints in this matter relate to, mainly, allegations of sexual harassment with a little unpaid wages added in. There were 3 complaints by 3 separate complainants, all alleging inappropriate sexualised behaviour or sexual harassment from the Barrister. The case is *Council of the NSW Bar Association v Waterstreet*[10].

52. Part of the response by the Barrister was to introduce evidence from a former assistant who described the "*open reciprocal culture of sharing/over sharing about personal matters at the office, in emails, text messages and after work … [The Barrister] encouraged an environment that allowed everybody to discuss their mental health and sexuality* ***in detail****."* (emphasis added)

53. I will not go into detail of all the allegations against Mr Waterstreet, but it seems clear that his conduct, although accepted by many within his workplace and elsewhere, was very unwelcome to others. Each of the allegations against Mr Waterstreet were determined to be the lesser form of misconduct, namely unsatisfactory professional conduct, but collectively it was found that they constituted professional misconduct. His conduct included:-

    a. With a young law student who was employed by him as an admin/research assistant, upon seeing a picture of a book launch involving the Barrister of someone she went to school with, he asked her if she had a crush on that person when she was at school. After that discussion, the Barrister brought out a copy of the book that had been launched (called "Private Bodies") and he showed her parts of that book. The book apparently has nude or semi-nude pictures of people including of himself with the former school friend of his assistant. He also, later, showed his assistant numerous photos of women in lingerie while commenting on their appearance.

    b. During an interview of a different person for the role of Paralegal or similar, the Barrister opened the Penthouse magazine website to show the distressed interviewee. The justification for this was that he had apparently written some articles for the

[9] While it appears that there is still a non-publication order in place in relation to the various complainants, the barristers Wikipedia page seems to have full details of each of the complainants.
[10] [2024] NSWCATOD 47

magazine. During that same interview he then brought out a sex toy and started talking about it with her. He talked about his sex life in detail and showed her a video of himself engaging in sexual acts.

c. A female assistant from a Sydney firm delivered a brief after hours to a different Barrister at the same chambers at which the Barrister held chambers. As a result, she needed to use the service lift to exit the building. The Barrister entered the lift together with 2 other men and went down in the lift with her. He did not previously know this person at all. He made a number of inappropriate comments to her and repeatedly asked her which of the other people in the lift she would "prefer". At one point he suggested that 1 of the other men in the lift was her age and then said "*but if you like money*" and gestured to himself[11]. When another man entered the lift he again repeated the question about which of the men she would prefer. When a woman entered the lift he then said "*which of the 5 of us would you prefer*?"

54. Not surprisingly, each of the women involved in these matters were extremely uncomfortable at the Barrister's behaviour. He seems to have considered it to be normal behaviour in his circumstances given the culture within which he works. As indicated above, he was found guilty of unsatisfactory professional conduct and professional misconduct. The matter was adjourned to a date last week for decisions on outcome. At the date of writing this paper, I have not seen any reports of the outcome.

OTHER NSW & ACT DISCIPLINARY CASES

Council of the Law Society of NSW v Sideris[12]

55. The practitioner in this case was found guilty of professional misconduct as a result of repeated breaches of 2 specific rules in the Uniform Conduct Rules. The rules that he was found to have breached were:-

[11] It should be noted that the Barrister was declared bankrupt in 2018 owing over $400K to the ATO
[12] [2024] NSWCATOD 3

a. Rule 33 - A solicitor must not deal directly with the client or clients of another practitioner; and

b. Rule 4.1.2 - part of what are described as fundamental ethical duties - A solicitor must be honest and courteous in all dealings in the course of legal practice. It was the courteous part of the rule that he was found to have breached.

56. In relation to the first of those, there was no dispute that the solicitor had sent communication regularly to the other party notwithstanding that he clearly knew that a solicitor was acting for the other party. The defence by the solicitor was that he was not acting in his role as a solicitor. He was the son-in-law of the "client" and he had a power of attorney to act on her behalf. He asserted that, given that he was acting under the power of attorney, he was not dealing with the other party in the course of legal practice.

57. The question that arose was whether or not he was acting as a solicitor when he was assisting his mother-in-law. A person "*acts as a solicitor if they do a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that they are a solicitor*."[13] The tribunal found that the practitioner was acting as a solicitor. There were 2 main reasons why this was so:-

a. He regularly and repeatedly made threats to commence legal proceedings on behalf of his mother-in-law. "*Threatening legal action on another person's behalf is almost exclusively the domain of legal practitioners, save a few exceptions"; and*

b. He also regularly and repeatedly pointed out to the other party that he was acting on a "pro bono basis" and that he was not charging any fees. The implication from these comments was that he was otherwise entitled to charge fees for the work for he was undertaking. As an attorney acting under a power of attorney he had no right to charge for his work. The tribunal held that "*the inference that should be drawn from these items of correspondence is that the solicitor would be entitled to charge fees, but that he has elected to waive any such fees."*

[13] Re Sanderson, ex parte Law Institute of Victoria (1927) VLR 394

58. The solicitor also signed all of his correspondence, whether by email or letter, as solicitor or principal solicitor.

59. Given that he was found to have been acting as a solicitor, he was bound by rule 33 and was prohibited from corresponding directly with the other party given that the other party was represented by a solicitor.

60. The requirement to be honest and courteous in all dealings really is a fundamental part of our ethical duties. In his correspondence both with the other party directly and with the solicitor for the other party, he regularly engaged in entirely inappropriate language and made personally offensive remarks about the client and the other parties' solicitor. The Law Society particularised 49 occasions when the solicitor used "*profanities, offensive and otherwise inappropriate language"* and in a further 26 documents he made "*derisive, derogatory and condescending remarks."*

61. I am not going to attempt to include all of the correspondence from the lawyer that is referred to in the judgment, but I think a few are required to make the point. The correspondence from the lawyer included the following statements at different times:-

    a. "*If you think I sound frustrated well you are NOT WRONG. Pissed off I think is the word"*

    b. *"So basically I am fed up with your crap so test my patience no more…"*

    c. *"If you think I am pissed off – then try me further as I am really pissed off that an old lady can be treated this way by you… What sort of people are we dealing with here. Yes, I forgot, stupid lawyers that are embroiled in their self-importance."*

    d. *"You want to complain to the Law Society, well let us see who wins here you pathetic human."*

    e. *"In short I could say fuck off but I am too much of a gentleman."*[14]

[14] Interestingly, while dictating this using Dragon Dictate, the system refused to accept any of the swear words in the above series of quotes and I had to put the words in manually. Perhaps the solicitor should use Dragon Dictate?

62. As a result of the repetition of the behaviour, the solicitor was found guilty of professional misconduct. Unsatisfactory professional conduct can amount to professional misconduct where it involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. In a later decision of the tribunal, it was recommended that the solicitor's name be removed from the Roll[15].

***Council of the Law Society of New South Wales v Malakhov*[16]**

63. In this matter the Law Society and another practitioner agreed as to the facts and the matter was before the Tribunal for determination of penalty. The practitioner wholly accepted that his behaviour was inappropriate and he accepted that a finding of professional misconduct was appropriate.

64. The solicitor was found guilty of professional misconduct for a breach of:-

    a. Rule 5.1 - A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to … bring the profession into disrepute; and

    b. Rule 34.1 - A solicitor must not in any action or communication associated with representing a client … make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person.

65. The practitioner was appearing for a husband in the Local Court. He was charged with breach of an FVO and intentionally or recklessly destroying property. For reasons that are completely inexplicable to me, the practitioner asked the police officer who was appearing in the matter if he could speak to the wife who was the complainant, in the police officer's presence. Even more inexplicable was that the police officer agreed to this course of action.

[15] It is noted that only the Supreme Court can actually order that a legal practitioner be removed from the Roll
[16] [2023] NSWCATOD 182

66. The first part of the practitioner's conduct that was problematic was that, when he got into the room with the wife and the police officer, he said to the wife "*you understand these charges are very serious? We reserve the right to charge you for assault*." Essentially it was the defendant's case that the wife had hit his head on a wall.

67. The tribunal found that this conduct constituted a threat and significantly overstated the husband's capacity to bring about charges against the wife. His conduct "*had potential to instil fear into the wife and to influence her decisions about her participation in the legal proceedings"*. Indeed, the matter was not able to proceed on the day of hearing as a result of the practitioner's engagement with the wife.

68. After the practitioner made the above comments, the wife indicated that she no longer wished to continue to speak to the practitioner and the police officer present asked him to remove himself. He repeatedly refused and almost had to be forcibly removed from the room. Whilst he was being removed from the room he continued to try to speak to the wife and he said to her "*you know if he is convicted his partner Visa will be removed and you will be a single mum raising 3 kids on your own."*

69. In relation to this behaviour, the tribunal found that the statement was "*a wholly unacceptable and inappropriate statement to make to a wife who is on the threshold of proceedings involving allegations that her husband has committed acts of domestic violence against her. It clearly has the potential to interfere with the wife's decisions about her participation in the legal proceedings."* This statement, and the practitioner's refusal to leave the room upon request, was found to be conduct which was likely to a material degree to bring the profession into disrepute.

70. It is unlikely to ever be appropriate to threaten other proceedings in order to try and achieve an outcome for your client.

71. Because of his contrition, and possibly because of his plea of guilty, the solicitor was not struck off. He was reprimanded, fined and required to undertake courses in the legal ethics and pay costs.

SUMMARY

72. Having a complaint made against you may well be a rite of passage for Family Lawyers. The fact that a complaint is made about you is not something that, of itself, is a problem. It is only if a finding is made. A significant proportion of the complaints made against Family Lawyers are dismissed pursuant to section 399. If a complaint is made about you then respond fully and frankly to the Law Society. It is absolutely a better path to make concessions where they are appropriate rather than to "*come out swinging*" as Mr Aulich did.

73. Importantly, if you have an ethical dilemma, make sure you obtain advice from someone else if you can. I have contacted senior counsel in my chambers on a couple of occasions in relation to ethical issues. Even though they confirmed my view about the matter, it was helpful to obtain their advice. Counsel with whom you have a relationship are likely to be happy to provide such advice, if you cannot find a senior solicitor to speak to. I understand that the Law Society can also refer you to senior practitioners for such advice. The professional standards manager may also be able to assist.

Dated 15 August 2024

Gavin Howard

Barrister

Blackburn Chambers Canberra