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# The 2023 Intensive Conference

# "Staying ahead of the game"

Conference papers

**Ethics in Family Law – 2023**

**Di Simpson**[1]

**Introduction**

Our newest members of the profession join our ranks after establishing that they are "*fit and proper"* to do so and have met the *prescribed requirements*[2]. Perhaps for some, that may be the last time they purposefully turn their minds to what it means to be a part of this profession and to be mindful that the way we conduct ourselves, engage with each other, our clients and the courts, must be shaped by a series of principles and obligations.

The *Legal Profession Act (2006)* (LPA) empowers the Law Society of the ACT to regulate the practice of solicitors and for the operation of legal practices/partnerships, among other things. It in part operates to give effect to the reality that certain work can only be undertaken by legal practitioners, in the interests of the administration of justice and the protection of consumers[3]. There are those outside of our profession who would suggest that we operate within a protected 'industry', where powerful lobbyists and interest groups (Law Societies, the Bar Associations and the Law Council of Australia) work to shield that work from the entry of other providers and further competition.

To the extent we maintain that there is a difference in working in this field compared to others, what makes us so special? We operate in a field of protected and regulated professional expertise, the membership of which imposes upon legal practitioners a series of duties and obligations, which means that more is expected of us, compared to others within our communities.

We are bound to act in accordance with a series of responsibilities which are sourced from legislation, professional rules and general law[4] (contract, torts and equity).

Here in the ACT, we operate under the *Legal Profession (Solicitors) Conduct Rules 2015* (the Rules). The Society has also prepared commentary and guidelines to accompany the Rules. Failure to comply with the Rules may amount to unsatisfactory professional conduct or professional misconduct. In extreme cases, a practitioner will lose the right (and associated privileges) of practising as a lawyer.

This paper is a refresher on some of the key duties, responsibilities and protections afforded by the Rules.

In the practice of family law, we are also required to comply with additional obligations, now expressed in the *Federal Circuit and Family Court of Australia Act 2021 (Cth)* (the FCFCOA Act) and the attendant FCFCOA rules.

I also touch upon some recent authorities which may be instructive.

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[2] Part 2.3 of the Legal Profession Act 2006 (ACT) and including s 26

[3] Legal Profession Act 2006 (ACT) s 6

[4] Australian Law Reform Commission, Discovery in Federal Courts (ALRC CP 2), 14.11.10

**Ethics in real life**

We are all operating under considerable work place and social pressures at the moment – increased file loads and particular client demands, it seems, in the wake of the pandemic. Those pressures are felt in long working days and greater expectations of immediacy and availability – working from home meant for many that the boundaries between work and home were blurred.

Under the demands of clients and of employers, we can all become short and frazzled with each other. We have been required to learn and adapt to a new case management system in the Courts and the pre-action procedures required has imposed additional tasks and burdens.

It has been a hard time to be a family lawyer.

In that context, the Rules provide clear guidance (and protections) for us all in the discharge of our professional obligations. Our duty to the court and to the administration of justice is paramount[5]. We must be honest and courteous in the course of our practice.[6]

The expectations imposed upon us in the Central Practice Direction (CPD) (which includes the overarching purpose) are also clear (emphasis added):

Paragraph 1.1 (c ) – " *achieves the overarching purpose of the family law practice and procedure provisions of the Federal Circuit and Family Court of Australia Act 2021 (Cth)…**being to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible***"

*and*

Paragraph 1.3 – "*…the Court takes the overarching purpose…seriously. Parties and their lawyers are expected to fully comply with that statutory obligation in all cases without exception, regardless of the complexity of the case or the issues in dispute, subject only to ensuring the safety of parties and children. This co-operation requires (and the Court expects) that the parties and their lawyers think about the best way to conduct their cases in accordance with the overarching purpose…*"

*and*

Paragraph 1.4: - "*The Court expects parties and their lawyers to have in mind…engaging in productive and resolution-focused communication with other parties…pressing only issues of genuine significance…aggressive and unnecessarily adversarial conduct will not be tolerated…*"

*and*

Paragraph 1.5 – "*Any failure to comply with these requirements may attract costs orders against parties and/or practitioners and other consequences…*"

There are some common risk areas for family lawyers:

***Communication with colleagues***

Sometimes it can be difficult to retain distance or separation from the perspective of one's client and we may be called upon to express the position of the client in terms which are more impassioned

[5] Legal Profession (Solicitors) Conduct Rules 2015, rule 3
[6] Ibid, rule 4.1.2

than they ought to be. Remaining separate from the conflict between the parties is essential – you are doing your job only and you do a disservice to your client if you adopt their conflict as your own.

Sending emails or letters which are bullish, aggressive, inflammatory or threatening are entirely unhelpful. Receiving such communications is unpleasant too but should not be taken as an invitation to return fire. Justifying your conduct on the basis that "*she did it first*" will not save you. Engaging in communication of this nature is not consistent with your professional obligations under the rules and would not meet your obligations under the CPD.

The positive alternative to this is to experience the pleasure of dealing with a colleague with whom you can confidently engage in respectful discussions and even where agreement cannot be reached, the different positions maintained reflect the instructions of the client and not a failing between the practitioners.

I have experienced many clients over the years who have exhorted me to be *tougher* or to be more *aggressive*. I have become better at managing those expectations and reminding the client that I have obligations which I must meet. As the rules make clear, we cannot be a mere mouthpiece or post-box for our clients.[7]

I reflect upon the intended audience when I receive inflammatory or aggressive letters – they are not intended to persuade my client as to a different view (and won't impact on me) but are happily read by the client who instructed their lawyer to send them. A letter of this nature, attached to an affidavit, can tell the court a great deal about the client providing the instructions – and when the court has duelling letters of this nature, inferences may be drawn about the conduct of the lawyers.

The observations of Benjamin J in *Simic and Norton*[8] come to mind, where his Honour commented upon "*Sydney matters*" (noting that some have suggested to me that practice in Canberra is like Sydney, without the money):

*"[2] In the Sydney Registry of the Family Court I have observed what seems to be a culture of bitter, adversarial and highly aggressive family law litigation. Whether this win at all costs, concede little or nothing, chase every rabbit down every hole and hang the consequences approach to family law litigation is a reflection of a Sydney-based culture by some or many litigants or whether it is an approach by some legal practitioners or a combination of both, I do not know.*
*[3] Whichever is the cause, the consequences of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children. It must stop*."

It is especially important that you exercise your skill and care at this time and do not 'top and tail' a letter prepared by your client. It still happens and it is quite concerning to receive those letters. What is the point of 6 years at university, years of practice and engagement in CPD if you are prepared to cede your expertise to the work of your client – if your client wants to be self-represented, then so be it. Don't offer a hybrid where your client's work is legitimised by your name and professional standing (which may be adversely impacted by that engagement).

Our professional reputations are everything – and the work of years or decades, can too readily be wrecked by moments of misjudgement. Be cautious about and protective of your professional reputation.

[7] ibid, rule 17
[8] [2017] FamCA 1007

Seek the support and guidance of senior practitioners, in your firm or elsewhere and or seek the assistance of the Law Society.

Apologise, if you consider your engagement with a colleague to have been less than ideal. Tempers can flare and the pressures of client, court and practice deadlines can be great.

Communication with the court also requires care. The court has published conventions/guidelines which make clear what is expected of practitioners when communicating with Chambers, yet from time, those guidelines are ignored (or perhaps forgotten in the heat of the moment). Emails to the court should not be sent outside of the convention and should not be used to:

- advance your client's arguments in anticipation of a hearing;
- be critical of your opponent or their case; or
- set out matters of controversy.

The FCFCOA website advises as follows with respect to contacting chambers:

1. All communication written to a Judge or Senior Judicial Registrar must occur through the Associate to the Judge or Senior Judicial Registrar.
2. Any necessary communication with the Court should be done with the consent of all the parties, and in writing.
3. Before contacting chambers, the parties and/or their legal representatives should agree that it is appropriate to contact chambers and/or the issue cannot be resolved without a Judge or Senior Judicial Registrar. For this purpose, you should always contact the other parties in your case, and any legal practitioners involved, if any, before contacting the Court, explaining the reasons for the communication.
4. In urgent circumstances or where the other party's consent is not able to be achieved within a reasonable period of time, any email to the Associate should include all other parties, or their legal practitioner (if represented). Chambers staff will not respond to your email unless all parties are copied into the correspondence.
5. Unless in exceptional circumstances, parties and practitioners should only communicate with chambers staff by email.
6. All communication with chambers should be courteous and respectful. The Court will not respond to correspondence containing abusive or offensive language.

***Court work***

There are specific rules which guide our conduct in court and adherence to them will do so much in building your professional reputation with the court and with those appearing for other parties against you. You are required to exercise professional judgment in the advancement of your client's case – which includes:

1. an obligation to confine the hearing to the "*real issues*";
2. to present the case quickly and simply but consistently with its "*robust advancement*"; and
3. you must advise the court of any authority *against* your client's case.[9]

The similarity with the principles in the CPD is clear.

[9] ibid, rule 17

Advocacy is not about your personal views and you must not communicate with the court in such a way as to suggest your personal views on the merits of a matter[10] (I *submit* not *I think*…)

Of course, your communication in court on behalf of your client must be formal and not familiar[11] and this will include written documents in which submissions and summaries of principles are expressed.

Leaving aside the formal requirements under the FCFCOA rules, it is *not* compelling advocacy in those documents to express criticisms of your *opponent* rather than the case being mounted. It is ok to express respectful disagreement with an approach or outcome being urged by your opponent, but it distracts from the issues to do so in language that is critical of the person who has authored the document.

For early career lawyers, find those advocates whose work you admire and emulate their style and engagement (which usually is the product of much work and detailed preparation) – and ring them for advice and guidance. I am absolutely confident that senior practitioners at the Bar and in the ranks of solicitors will provide that support to you.

You must be careful not to overstate positions on behalf of your client, or to mislead or deceive the court and if you have made an error, correct it promptly [12]. Similarly, you must not knowingly make a false statement to an opponent[13] and we may not take unfair advantage of "*the obvious error*" of another practitioner or person, if that would result in our client obtaining a benefit which is not otherwise supported in law or fact.[14]

**Managing the financial relationship with our clients**

For those of us engaged in private practice, managing the financial relationship with the client can be routinely challenging – has the fee agreement been provided (assuming it meets the requirements under the LPA and the client has received notification of their rights); has the client had regular and updated estimates of fees (meeting the obligations of cost disclosure under the LPA[15]); do we have sufficient funds in trust; and can we avoid a conflict of interest between their interests and our own (in being paid for our service) if fees are deferred.

The management of the financial relationship with the client is important. We are required under the rules of the FCFCOA to make disclosure to our client, to our opponent and to the Court about the costs incurred by our client at the time of each court event and which is to include an estimate of future fees.[16] This obligation is accompanied by a requirement that costs charged to clients must be fairly, reasonably and proportionately incurred, and be fair, reasonable and proportionate in amount (in the circumstances of the proceeding).[17]

For family law clients, the fees paid to their lawyers are usually being drawn from a finite pool of property or from income streams and there is rarely an uplift at the end of a matter (the parties are sharing slices from the same pie after all).

[10] ibid, rule 17.3
[11] ibid, rule 18.1
[12] ibid, rule 19.1 and 19.2
[13] ibid, rule 22
[14] ibid, rule 30
[15] Op Cit, Legal Profession Act, 2006 (ACT) s 269
[16] FCFCOA Rules, Chapter 12, rule 12.06
[17] ibid, rule 12.08

Particular challenges may arise in adherence to duties when a client's legal costs are to be paid at a later date.

In *Charisteas v Charisteas*[18] the Full Court was again asked to determine an appeal brought by the husband from orders made by the primary Judge in which she had refused the husband's application to restrain certain lawyers and counsel from acting for the wife and a *dollar for dollar* litigation funding order. Its judgment (Alstergren CJ, McClelland DCJ and Aldridge J) was delivered on 7 October 2022.

This matter is well known to family lawyers, including the decision of the High Court hearing an appeal relating to asserted apprehended bias of the primary Judge (who had made final orders under s79 in 2018)[19].

The matter had been remitted to the (new) primary judge for re-hearing. There had been a number of procedural hearings. The parties had separated in 2006 and litigation had been on foot since that year. The proceedings were complex and there were 12 respondents, in addition to the wife and there were two third parties involved. One of the third parties was a commercial litigation funder who had funded the wife's case. The funder had obtained judgment against the wife in 2014, for an amount in excess of $2.2M. It was joined to the proceedings in 2018 and was seeking payment of any money payable to the wife in the proceedings. At the time of this appeal, the debt owing by the wife to the funder was around $3.6M. The wife's two adult daughters were guarantors of that borrowing.

The funder's solicitors (the firm) and counsel (Mr P) now also acted for the wife, after her lawyers had ceased acting in April 2021 (and after the High Court had remitted the matter for hearing).

Ms D, who had been the wife's counsel at the final hearing the subject of the High Court proceedings, continued to act for the wife as junior counsel. It was the contact between Ms D and the trial judge which had been the foundation for the application to set aside the orders from 2018.

The husband applied to restrain the firm, Mr P and Ms D from acting for the wife. The husband argued that the firm, Mr P and Ms D could not act for the wife while acting for the litigation funder (at the time of the appeal, Mr P indicated he would withdraw). A particular test about conflict of interest was argued before the primary judge and she concluded that there was *no substantial possibility of a conflict* and did not restrain the firm and counsel, as sought by the husband.

He appealed (and also about the costs order).

As to the restraints/conflict of interest grounds of appeal, the Full Court noted that the primary judge had been led into error by the parties as they urged upon her an incorrect principle when determining when a legal practitioner should be prevented from acting. The correct test was held to be that set out in *Porter v Dyer*[20] - whether a "*fair minded, reasonably informed member of the* ***public might conclude*** *that the proper administration of justice requires that a legal practitioner should be prevented from acting…*" (emphasis added).

The key concerns for the Full Court included:

- it was in the wife's interests that she have her own independent legal advice and representation (given the complexities of the case);

[18] [2022] FedCFamC1A 160
[19] *Charisteas & Charisteas and Ors* (2020) FLC 93-971; [2021] HCA 29
[20] (2022) 402 ALR 659

- the wife's lawyers were in conflict as they acted for both the wife and the litigation funder;
- that there was potential conflict and actual conflict between the interests of the firm and the wife; and
- if the conflict was identified to a fair minded, reasonably informed member of the public, they would conclude that the proper administration of justice required the restraints;
- the Full Court also concluded that the wife's junior counsel could not continue to act for her – an application for costs against counsel personally and the wife (jointly and severally) had been made by the husband and Ms D was a party to costs proceedings; it was noted that it may have been in the interests of the wife to seek costs against Ms D (and she would need advice about that)

The husband's appeal was allowed and orders restraining various lawyers/the firm from acting in the proceedings were made. The litigation funding orders were also set aside (and remitted for hearing).

The conflict issues were real – how would the firm balance meeting the interests of the wife with those of the litigation funders, for example if settlement discussions were to occur which might include less property in return for more superannuation (not useful to the litigation funder and not helpful to the guarantors)? How would a solicitor meet the competing interest of their clients in those circumstances (and where one client has a judgment debt against the other)?

Junior counsel had been the person who had exchanged text messages and had coffees with the previous trial judge during the final hearing (and during periods of adjournment). She also appeared as junior in the High Court.

These proceedings are being heard in Perth. There is a relatively small pool of family lawyers working there. This is complex and long drawn out litigation. Who is likely to now step in to act for the wife?

In the determination of the costs application arising from this appeal[21], on 15 February 2023, it is noteworthy that the wife did not file submissions to address costs and did not seek an extension of time to do so. It is noted in the judgment of the Full Court that the wife "*appears, at present at least, to be impecunious, as accepted by the applicant*" [5]. Costs were awarded but to be paid at the conclusion of the property proceedings.

***Engaging experts***

Family lawyers are routinely required to secure and instruct experts to prepare reports and give evidence in proceedings. That is most commonly undertaken as part of a joint engagement of a single expert[22] but from time to time, it is necessary to engage an adversarial expert and the rules also set out the requirements for doing so[23].

The rules set out clear guidelines as to this process and the obligations upon practitioners and the expert. Specific obligations in the process of instructing the expert are set out in rule 7.13. The duties of the expert (primarily to the court) are also made clear in the rules[24].

[21] *Charisteas & Charisteas* (No 2) [2023] FedCFamC1A 10
[22] ibid, Division 7.1.2 – Single expert witness
[23] ibid, rule 7.08, r 7.10
[24] ibid, rule 7.18, r 7.22

In *New Aim Pty Ltd v Leung* [25] the Honourable Justice McElwaine in the Federal Court determined proceedings relating to the equitable obligations of former company employees who it was alleged, had used confidential information acquired in their employment in breach of certain statutory obligations. In the course of the hearing, expert evidence was obtained by the applicant, from Ms Chen, who asserted relevant industry expertise and knowledge (about sourcing suppliers in China). It is the report and the process of obtaining it which is of interest to us.

The firm acting for the party commissioning this report is a major, national firm.

Objection was taken to Ms Chen's report, which was attached to a witness statement. She made the usual statements that she was engaged as an independent expert witness (by the firm); that she had been provided a copy of the expert evidence practice notes and code of conduct; that she had read those documents and had complied with those obligations.

Attached to her statement was the engagement letter from the firm. She attached her expert report, which was 60 pages long. The letter of instruction was dated 7 March 2022 and the report was dated 8 March 2022.

At [47] his Honour observes:

*What is remarkable about that timeline is that the letter of instruction directed Ms Chen to provide an overview of her business, with a focus upon the service that her business provides to clients and then to explain the practices "(if any) in the industry (including in particular, in the e-commerce sector) concerning the use and treatment of information pertaining to the identities and details of suppliers in China", all of which was able to be answered by Ms Chen in the form of her expert report the following day, comprising 16 pages and 60 paragraphs, not including attachments.*

Ms Chen was cross examined. It was put to her that she did not prepare the report alone and could not have done so in 24 hours. She agreed she had some discussions with the lawyers and that she had sent drafts to the lawyers for comment. She agreed she received comments back from the lawyers on her drafts. She prevaricated and was at times unresponsive when asked if the firm had asked her to make changes to her report.

She was pressed as to who was responsible for the drafting of certain parts of her report. Eventually, she named a (young) lawyer in the firm.

Certain similarity between statements in her report and those of one of the parties was drawn to her attention.

At [49] His Honour observes:

*Once again it was directly put to her that she was not the author of all of her expert report. She failed to give satisfactory answers to those questions but eventually conceded that "but if you say every words of the sentence is exactly 100 per cent written by me, no" [sic]. Her demeanour was distinctly uncomfortable in giving that answer.*

Ms Chen eventually conceded she had received emails from the firm asking her to make changes to her report. A call was made for those communications and documents were produced. Those documents made clear that there was significant collaboration between Ms Chen and the instructing lawyers.

[25] [2022] FCA 722

Discussion occurs in the judgment about circumstances in which it is permissible for lawyers to assist an expert in expressing their opinion in a way that will meet the admissibility requirements of the court. However, in this instance, the assistance went beyond "permissible guidance" as to the form of words to be used to express an opinion held by the expert.

It is also noteworthy that the firm was requested by solicitors for another party to provide copies of all documents and communications between the firm and Ms Chen along with drafts of the expert report. Those several requests were rebuffed (it being asserted that there was "*no legitimate basis for such a request*" and a claim for privilege was maintained – but later not asserted when the call was made in court).

At [70] His Honour observes:

*There are many difficulties with the expert report of Ms Chen, which individually and cumulatively lead me to the conclusion that I should reject it in its entirety. I am left in a state of uncertainty as to who was responsible for the drafting of which portions of her report. It would appear that most of the report was, at least initially, the product of drafting by the lawyers for the applicant, albeit in reliance upon some material of a non-specific nature that Ms Chen provided to the lawyers. The fact that Ms Chen adopted the drafting of others as her opinion does not address the more fundamental issue that her engagement obliged her to act as an independent expert witness conformably with the requirements of the Expert Evidence Practice Note and the Harmonised Expert Witness Code of Conduct.*

In a blow to the lawyers involved, his Honour notes [74]:

*Regrettably, I also find that the conduct engaged in preparing and delivering the report of Ms Chen was misleading. The letter of instruction of 7 March 2022 conveys the representation that Ms Chen was engaged to prospectively consider each of the two questions the subject of her instruction. Contrary to that representation, a draft of her expert report had been prepared by Corrs no later than 25 February 2022. It was wrong in my opinion to state in the letter of 7 March 2022 that Ms Chen was instructed to prepare a report in response to the two questions posed in that letter, when the author was plainly aware not only of what the answers would be, but also, as to the form of the opinion and the fact that its expression was the product of drafting by Corrs. The letter of 7 March 2022 conveys the false representation that Ms Chen, as the independent expert, would upon receipt of the instruction set about the task of preparing her report. The failure to disclose those facts to the solicitor for the respondents and ultimately to the Court is most concerning, as it strikes at the very heart of the paramount and overriding duty that an independent expert has to assist the court impartially on matters relevant to the area of expertise of the witness, as stated at clause 2 of the Code of Conduct.*

The report was rejected in its entirety and nothing said by Ms Chen in her oral evidence was found to be of assistance in addressing the matters in dispute. No doubt a difficult few days in court for the lawyers involved.

**Conclusion**

The last case makes clear that even highly experienced lawyers in highly reputable firms can fall into error and make mistakes – which impact their professional reputations and standing. In our close community of family law practitioners in Canberra, we have the opportunity to provide support and guidance to each other in the performance of our duties and obligations.

Hopefully, there is less of the competitive elements which may negatively influence the nature of practice in other locations. I am reminded by others wiser than me, that respect and generosity is easy to give and that despite our assumptions, we never really know what someone else is experiencing. At a time when everyone appears to be so busy and mental health challenges for so many of us are real, extending that consideration is important.

**2 March 2023**.

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