Print Page Close Window

Ethics

Public Defenders' Criminal Law Conference 2010

ETHICS

Presenter:

Phillip Boulten SC
Forbes Chambers

INTRODUCTION

For the last few years I have been exposed to professional conduct and ethics problems involving dozens of barristers. As a member of the Bar Council and the chair of a PCC, barely a week has gone past without having to consider the fate of one of our colleagues.

My talk this morning draws on these experiences. I have seen a pattern

People who are the subject of complaints often have common characteristics. The cases that come before the Bar Council, the Administrative Decisions Tribunal and, I dare say, the Council of the Law Society, often focus on a small range of issues and the practitioners concerned usually have a particular profile. It has occurred to me that much of the difficulty that barristers get themselves into is entirely predictable and usually avoidable.

The common problem areas are:

issues relating to fees;
issues relating to their professional relationship with their clients;
issues relating to the barrister's own taxation affairs;
issues relating to the barristers' dealings with the courts.

Most of these problems arise in a background of the barrister:

— being demonstrably and chronically disorganized;
placing a great emphasis on their court craft and performance but with little or no attention given to administration, accounts, banking, fee disclosure, fee agreements, fee notes, taxation returns or any aspect of practice management.
experiencing trouble and instability in their personal lives — marriage problems, financial difficulties, other family-related problems often accompanied by depressive illness, substance abuse problems and/or gambling issues.

There are a number of clear warning signals for solicitors and barristers. I wish to highlight six areas this morning.

1. PROCRASTINATION

Almost everyone is guilty of this sin. Some more than others. Some matters are more easily dealt with than others. The temptation is, though, to postpone dealing with the more complicated or more bothersome tasks.

Often, we put off attending to written work in a way that ultimately leads to dissatisfaction on our client's behalf. It is important to 'put your head down' and attend to even unpalatable tasks in a timely manner in order to avoid complaints

A more common problem is procrastination about administrative tasks. Too many of us race ahead undertaking substantive steps in the conduct of a case without attending to the necessary preconditions that are required under the Legal Profession Act regarding fee disclosure, fee agreements and the like. Less often, people fail to adequately record the work that they have undertaken and/or to document the basis upon which they charge fees.

This is a recipe for potential disaster.

2. SLOPPY FEE DISCLOSURE

Let everyone know where they stand in advance — in writing. There are specific rules that apply for all direct access practitioners. These rules are stringent and non-negotiable. (see s. 309–318A Legal Profession Act 2004).

These disclosure provisions are a very good reason for barristers not undertaking direct access work. Although, there are other reasons that provide a sound basis for not doing direct access work:

> Being briefed by a solicitor results in a clear division of labour between the solicitor and barrister.
> There are problems with perception if a barrister is competing for work with solicitors. Clients have usually been someone else's client previously— usually a solicitor's.
> It is particularly galling for a solicitor to see a barrister acting for the solicitor's old client on a direct access basis—especially if the barrister had previously been instructed to appear for that client by the solicitor.

3. SLOPPY PAPER WORK

Many fee disputes arise because of lack of precision. The money is paid but uncertainty surrounds why it has been paid and what is covered.

The lawyer undertakes work on a case. A dispute develops before the case is concluded. The client sacks the lawyer and then wonders why there is no money to be refunded—or worse still— why they have to pay even more money to their ex-lawyer.

In this context complaints to the Bar Association and the Law Society often arise. A typical complaint might be:

> The barrister did not run the case properly. He/she did not cross-examine the witnesses to my satisfaction. He/she turned up late. The magistrate was cranky with my lawyer.
> I paid the lawyer $5000 and did not get any money back—even though the case was not finished.

This form of complaint is fairly typical. Once made, it leads to an investigation by the Bar Association through a PCC committee. The investigation then often uncovers further facts:

> There was no disclosure to the client under the Legal Profession Act ;
> There was no fee agreement;
> There was no memorandum of fees or tax invoice;
> There are no records that the money paid was banked.

Typically the investigation shows that the barrister actually did the case in a professionally sound manner. Although the barrister might have been late to court, he was not very late and had a good reason and was appropriately apologetic. The magistrate was unreasonably difficult and the cross-examination of witnesses was tactically sound.

But, it is usually the money and paper trail that causes the biggest problem for respondents to this type of complaint.

The Bar Association often asks for the production of all relevant paper work. Section 660 of the Legal Profession Act requires production. Failure to comply is a criminal offence with a maximum penalty of 50 penalty units and constitutes professional misconduct (s.671).

On several occasions barristers have produced fee disclosure letters, draft fee agreements and tax invoices but the client sometimes disputes ever having received such documents. On one occasion recently, the Bar Association required the barrister to produce his computer so that it could be interrogated by a computer engineer. In that case, the barrister stopped cooperating, fiailed to bring in the computer, stopped going to court and did not renew their practising certificate.

There are strict rules that prevent barristers receiving trust monies. This is another good reason for a barrister not to undertake direct access work.

4. ACCEPTING CASH

It is not necessarily illegal to be paid in cash. But it causes headaches and, in some circumstances, it is illegal.

The Financial Transactions Reports Act requires cash dealers (such as banks) to report cash transactions of or above $10,000 to Austrac. Section 15A of the Financial Transactions Reports Act requires solicitors also to report transactions of or above $10,000 to Austrac.

Failure to give the necessary reports is a criminal offence with a maximum penalty of 2 years imprisonment (s. 28).

Structuring transactions to avoid the reporting requirements is a serious criminal offence carrying a maximum of 5 years.

Various money laundering provisions exist in the Crimes Act (NSW) and the Criminal Code Act (Commonwealth). These offences are committed variously if somebody deals in cash that they know to be the proceeds of crime or where they are reckless as to that fact. It is even illegal to deal with cash that is reasonably suspected of being the proceeds of crime. These are all serious criminal offences. The Bar Association and the Law Society would almost certainly regard any practitioner found to have breached these offences to be guilty of professional misconduct.

5. NOT ATTENDING TO TAX OBLIGATIONS

The Bar Association regards tax obligations seriously. Any substantial failure to comply with tax reporting requirements would be regarded as serious misconduct which could affect a barrister's fitness to hold a practising certificate.

This applies to BAS and income tax returns.

Any 'conviction' for taxation offences (including dismissals under s.19B of the Crimes Act) triggers two related provisions of the Legal Profession Act:

i. You must report the finding of guilt to the Bar Association or the Law Society within 7 days; and
ii. You must show cause to the appropriate Council within 28 days as to why you should be allowed to continue to hold a practising certificate (s.67).

Once the Association becomes aware of a relevant 'show cause' event, the Council must undertake an investigation into the practitioner's fitness to hold a practising certificate and reach a concluded view within 3 months about whether the practitioner is or is not a fit and proper person to hold a practising certificate and, if they are, whether the certificate should contain conditions or not.

The Association's investigation is carried out by one of its professional conduct staff in conjunction with a PCC. The investigation involves a thorough review of the lawyer's taxation affairs. Notices under s.660 require the production of documents and the answers to questions.

The lawyer is required to authorise the ATO to provide relevant taxation details to the Association.

The PCC considers all of the information uncovered by the investigation and submissions on the barrister's behalf. The PCC then provides a report to the Bar Council concerning the barrister's fitness to practise. All of this takes time—months, not weeks. If the process cannot be concluded within 3 months (or 4 months if the Bar Council obtains an extension), the barrister is automatically suspended from practice and the investigation is taken over by the Legal Services Commissioner.

This process is extremely stressful for all concerned. It is serious even if there has been no defrauding of the ATO and even if, by the time the matter comes to be investigated by the Bar Association, no money is owed to the ATO. A lawyer's failure to lodge tax returns, without more, is a matter that could affect their fitness to practise.

This issue is inter-related with the questions on your annual applications to renew your practicing certificates. One of the questions asks if you have been convicted of a tax-related offence. If you have and you have not given notice of it before hand, you are in trouble for not only being convicted, but for not complying with the statutory reporting requirements.

Another question asks if you have breached any tax laws in a way that could affect your fitness to practise. Even if you have not been charged or convicted of a tax offence, if your tax affairs are in a mess—especially if you have not lodged BAS returns or income tax returns within time, you are best advised to answer 'yes' to this question. This will then involve a disclosure about your apparently lax approach to tax obligations.

Answering 'no' to this question when, in fact, you are behind in your tax returns is a potentially large problem. If, subsequently, the Bar Association comes to investigate a barrister's tax affairs, it will go back and check what answers the barrister gave to these questions on the renewal applications. If the PCC or Bar Council form the view that the barrister was deliberately trying to obscure the true picture from the Bar Association's scrutiny, it could conclude that the barrister had been deliberately misleading it or that they were deliberately dishonest. If so, that finding itself may be enough to lead the Bar Council to conclude that the barrister was not fit to practise.

6. AN UNPROFESSIONAL APPROACH TO CLIENTS

At the heart of our relationship with clients is the concept of professionalism. We are engaged to assist them. This means that we must advise them in a disinterested way with their true interests in mind, rather than their own perceived notions of what their interest truly are. We are obliged to advise, not to merely reinforce the client's own belief about what should be the case.

Hence:

- the need to advise early about the utilitarian benefits of a plea of guilty;
- the desirability of testing client's explanations in a critical way, rather than blindly presenting obvious rubbish to the court;
- selecting the appropriate issues to contest in the proceedings. Isolate the real issues, fight on appropriate ground and avoid protracted, counterproductive point taking — even when the client has their own ideas of what should be in issue;
- refusing to craft defences for our client;
- never presenting evidence which we know to be false.

The detection of false evidence is, though, problematic. Sometimes it will be easy to detect. This is usually because our client has told us that his version is false. Often, though, even if you have doubts or serious doubts about the accuracy of evidence, you will not be in a position where you can say positively that you know that evidence is false.

An example of a barrister in trouble for presenting false evidence is New South Wales Bar Association v Punch [2008] NSW ADT 78.

John Punch was acting for a client charged with armed robbery. He spoke with his client and a co-accused in the cells of Bankstown Police Station. The police recorded the conversation using a lawful listening device.

In the candid conversation in the cells, Mr Punch's client instructed him that he had been present during the course of the armed robbery at the victim's house. John Punch told the client,

'*now if you're not actually, physically in there. You are out the back but you're still guilty you know, if they can prove that. But your whole case is just centred on if the prosecution can identify you. If you knock that out that's the end of the case. They've got nothing else.'*

Had Mr Punch conducted the trial on the basis that the prosecution could not prove the identity of the accused, he would not have breached any ethical duty to the court. Regrettably, he went further than that. He called evidence from his client to the effect that he was at home in bed at the time of the offence. He also called four witnesses who backed up the accused's alibi.

The tribunal concluded that, given the instructions received in the cells, Mr Punch knew that his client's evidence was false and his witnesses' evidence was false. This was a breach of rule 33 of the New South Wales Barristers' Rules. It was also an extremely serious breach amounting to professional misconduct. It had dire consequences for Mr Punch's career.

A related issue is, how much 'help' is it appropriate to give a client about their evidence? This is a topic about which reasonable minds might differ.

It is clearly okay to advise a client about 'style issues' such as:

speak up
maintain a good attitude in the witness box
be pleasant
no questions
no jokes
answer the questions directly.

It is also ethically acceptable to signal danger zones in their evidence. If their version doesn't sound believable, it may be because it isn't true. It is appropriate to tell clients that their version does not sound truthful and to advise them that it is not in their interests to give a false version to the court.

By this mechanism, I sometimes get a more believable account. This usually means it is a more incriminating account.

If, though, my client's account keeps changing so as to be more and more exculpatory, alarm bells start ringing. Sometimes a client's account will change so fundamentally and in such a way that the practitioner is left feeling quite sure that their client is not telling the truth. To lead evidence from a client in those circumstances would be to actively mislead the court as to the facts. That is unethical. It is professional misconduct.

All of this needs to be kept in context, though. Lawyers are not experts in assessing the reliability of their clients' accounts. We may have suspicions that our clients are not telling the truth. We may even have grave suspicions it, But, it is not our job to judge then. That is the jury's job. Our task is to represent them as best as we can, but our ethical duty requires us to refrain from actively misleading the court.