



Bar Practice Course

UNDERSTANDING, AVOIDING AND RESPONDING TO DISCIPLINARY COMPLAINTS UNDER THE *LEGAL PROFESSION UNIFORM LAW (NSW)*

Introduction

1. This paper draws loosely upon observations I have made across 11 years as a member of a professional conduct committee. It is neither comprehensive nor based on any analysis of the statistics published in the annual reports published by the Legal Services Commissioner. Rather, the paper aims to provide some practical guidance in relation to:
 - a. common sources of complaints and their general nature;
 - b. the complaints investigation process;
 - c. ways to reduce the risk of disciplinary complaints in the context of your day-to-day practice; and
 - d. how best to deal with a disciplinary complaint should one be made against you.

Complaints and the complaints handling process

Who complains about barristers?

2. Pursuant to s.266 of the *Legal Profession Uniform Law (NSW)* (the '**Law**'), any person or body – including the Legal Services Commissioner or the Bar Council – can make or initiate a complaint against a barrister.
3. In practice, the following are probably the most common source of complaints:
 - a. your client. A client will typically complain if they are unhappy with: your performance in court, the attention you are giving to their case, the outcome of their case, the amount they are required to pay you in connection with it or almost any combination of the above;

- b. your opponent. Complaints made about barristers by other barristers tend to allege a contravention of specific bar rules, usually those relating to the obligations of candour, the appropriate use of the court processes and conflicts of interest;
- c. another party to the proceedings. Other parties to proceedings commonly complain about the way a barrister has conducted the case. This often stems from unhappiness about the outcome of their case but also commonly relates to the robust way in which they have been cross examined, delays in the proceedings which they attribute to the barrister, a perceived lack of candour or conflict of interest;
- d. the judge. Complaints made by – or on the strength of observations made by – a judge are not common. However, when made they typically relate to the judge’s concern about a barrister’s competence, the role a barrister has played in prolonging proceedings, a perceived lack of candour or a conflict of interest; and
- e. the Bar Council. Most complaints initiated by the Bar Council relate to some troubling aspect of a barrister’s conduct discovered while investigating a complaint made by any one of the individuals named in (a) to (d) above. Common areas of concern are a failure to make adequate (or any) disclosure of costs or those matters required to be disclosed to a direct access client, gross overcharging, conflicts of interest, any lack of candour and other species of dishonesty.

Types of complaints

- 4. The Law contemplates three distinct types of complaints: (a) those that involve ‘consumer matters’ (b) those that involve ‘disciplinary matters’; and (c) mixed complaints, being those which involve both a disciplinary and consumer matter.
- 5. Section 269 of the Law defines consumer matters – somewhat unhelpfully – as costs disputes or ‘so much of a complaint about a lawyer ... as relates to the provision of legal services to the complainant ... as the [Bar Council] determines should be resolved by the exercise of functions relating to consumer matters’. Those functions are addressed

primarily in Part 5.3 of the Law and provide a mechanism by which consumer matters are to be mediated, settled or, if necessary, determined by the Bar Council. As the primary focus of this paper is complaints involving disciplinary matters, the potential difficulties created by this circular definition are overcome by s.268(2) of the Law, which makes clear that the conduct underpinning a complaint can be both a consumer matter and a disciplinary matter.

6. Disciplinary matters make up the overwhelming majority of complaints made against barristers in New South Wales. A disciplinary matter is defined by section 270 of the Law as ‘so much of a complaint about a barrister as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct.’ Distinguishing conduct which would, if established, amount to unsatisfactory professional conduct from that which has the potential to be professional misconduct is important.
7. Unsatisfactory professional conduct is defined in s.296 of the Law as:

‘conduct of a lawyer *occurring 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 lawyer’ (emphasis added)
8. Section 297 of the Law goes on to define professional misconduct as:
 - (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of a lawyer whether *occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law* that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.’ (emphasis added)
9. Section 298 of the Law identifies, in a non exhaustive way, types of conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

Investigating complaints

10. The complaints handling process is primarily addressed in Chapter 5 of the Law; Part 5.4 is particularly important in the context of a complaint involving a disciplinary matter.

11. Although not reflected in the express words of the Law, through a series of delegations all complaints made against barristers in New South Wales are investigated by a Bar Association Professional Conduct Committee ('PCC') which, in turn, makes recommendations to the Bar Council in relation to the disposition of individual complaints.

12. With the exception of complaints initiated by the Bar Council, all complaints against barristers are made to the Legal Services Commissioner, who refers them to the Bar Council for investigation. As noted above, in the first instance this investigation is undertaken by a PCC.

13. Pursuant to s.276 of the Law, the first thing the PCC must do is make a preliminary assessment of the complaint. After conducting this preliminary assessment, the PCC may recommend that the Bar Council close a complaint without further consideration of its merits where:
 - (a) the complaint is vexatious, misconceived, frivolous or lacking in substance;
 - (b) the complaint was made out of time;
 - (c) the complainant has not responded, or has responded inadequately, to a request for further information;
 - (d) the subject matter of the complaint has been or is already being investigated;
 - (e) the subject matter of the complaint would be better investigated or dealt with by police or another investigatory or law enforcement body;
 - (f) the designated local regulatory authority has made a recommendation under section 82(4) in relation to the lawyer concerned;
 - (g) the subject matter of the complaint is the subject of civil proceedings, except so far as it is a disciplinary matter;

- (h) the designated local regulatory authority, having considered the complaint, forms the view that the complaint requires no further investigation, except so far as it is a consumer matter;
- (i) the complaint is not one that the designated local regulatory authority has power to deal with;
- (j) the designated local regulatory authority is satisfied that it is otherwise in the public interest to close the complaint.’

14. If, following the preliminary assessment, the PCC determines that it is appropriate to close the complaint, it will make a recommendation to this effect to the Bar Council. If the recommendation is adopted, the complaint will not be investigated further (or at all) and the barrister concerned may not even be informed about the complaint.

15. If the complaint is not closed following the PCC’s preliminary assessment, the Bar Council – through the PCC – proceeds to investigate it and is obliged to deal with it in a fair manner, having regard to the respective interests of the complainant and the respondent and to the public interest.

16. Having decided to investigate the complaint, Bar Council must inform the barrister of the complaint, provide a summary or details of the complaint and inform them of their right to make submissions in relation to it within a specified period; this is done by staff in the Bar Association’s Professional Conduct Department. The individual who provides this information is the barrister’s primary point of contact in connection with all matters relating to the complaint.

17. The precise nature of an investigation will obviously depend on the conduct complained of. The PCC has the power to obtain information from the barrister and other individuals for the purposes of conducting its investigation; this power is routinely used to obtain contemporaneous documents relevant to the complaint and develop an understanding of the evidence particular individuals might give in relation to it. At the conclusion of its investigation, the PCC will prepare a draft report setting out the findings of its investigation of the complaint and proposing recommendations to the Bar Council in relation to its disposition.

18. In general terms, there are three possible outcomes of a PCC investigation:

- a. *first*, the PCC may conclude that the barrister has not engaged in unsatisfactory professional conduct or professional misconduct. This may mean the PCC is not satisfied that the conduct alleged by the complainant has been established at a factual level or, alternatively, that the established conduct is not capable of being unsatisfactory professional conduct or professional misconduct. In either case, the PCC will recommend in its draft report that the Bar Council close the complaint without taking any further action;
 - b. *secondly*, the PCC may conclude that the barrister has engaged in unsatisfactory professional conduct. There are two ways that the PCC can deal with such a finding. Usually, such a finding will lead to a recommendation that the Bar Council make orders under s.299(1) of the Law. The precise orders recommended will depend upon the conduct complained of and any other aggravating or mitigating factors but may include: a caution or reprimand, an apology, a fine of up to \$25,000, mandatory training, counselling or supervision and/or the imposition of conditions on the barrister's practicing certificate. If the PCC instead forms the view that the unsatisfactory professional conduct would be more appropriately dealt with by the Occupational division of the NSW Civil and Administrative Tribunal ('**NCAT**'), it may recommend that the Bar Council initiate and prosecute proceedings against the barrister in connection with it.
 - c. *thirdly*, the PCC may conclude that the alleged conduct may amount to professional misconduct. If so, it may recommend that the Bar Council initiate and prosecute proceedings against the barrister in NCAT.
19. What happens at this point depends largely upon the findings and other conclusions reached by the PCC in its draft report. If the PCC recommendation, in respect of a complaint, is adverse to the barrister the draft report must be provided to the barrister and the complainant for comment before it is provided to the Bar Council. The barrister is invited to make submissions (commonly referred to as '*Murray* submissions', in reference to the decision of the Court of Appeal in *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224). More specifically, the barrister is invited to make submissions

as to whether the Bar Council should make the resolutions proposed by the PCC or alternative resolutions.

20. On receipt of the barrister's Murray submissions, the PCC will consider those submissions and amend its draft report to incorporate the substance of them and any further amendments which the PCC feels are warranted based on the submissions made. This final report and its recommendations is then provided to the Bar Council for consideration and – if considered appropriate – adoption. If adopted, the report becomes a report of the Bar Council and any orders made are binding on the barrister. Subject to the appeal and review provisions in Part 5.6 of the Law, the Bar Council's adoption of the final report determines the complaint to which it relates.

Reducing the risk of a complaint being made against you

21. The most obvious way to reduce the risk of disciplinary complaints is to ensure that you do not transgress; the first two suggestions below are aimed at reducing the risk of transgression.

22. Unfortunately, strict compliance with the rules and legislation will not remove the risk that a complaint will be made against you. A large proportion of the complaints made against barristers are ultimately dismissed. It logically follows that these barristers were not transgressors. Nevertheless, a complaint was made against them. In these cases, it is useful to consider what, if anything, they could have done differently to have avoided the complaint. Even with hindsight this question cannot be answered with certainty; some complaints are probably unavoidable. However, there are a number of things that can be done to minimise the risk of such complaints being made against you; the remainder of the suggestions below fall into this category.

Familiarise yourself with the rules and legislation

23. There is no doubt that a proper understanding of the rules and legislation will reduce the risk of transgression and the complaints which properly flow from it.

24. Since July 2015, barristers' conduct has been regulated by the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. The changes introduced by these rules – although minor – are still relatively fresh. Print out the rules, read them front to back and keep the printed copy in your bottom drawer. On occasions when ethical questions arise, pull out your copy of the rules and consult it.
25. Common sense and intuition will get you a long way *but* neither is a substitute for actually familiarising yourself with, and understanding, the rules and the Law.

Seek ethical guidance early

26. Be alert to potential ethical questions and seek guidance and assistance in relation to them at the earliest possible point in time; that is, before they become ethical problems. There are two ways you can and should go about this; one formal, the other less so.
27. *First*, ethical guidance can be sought from any silk who is a member of a professional conduct committee. The names and telephone numbers of silks on professional conduct committees can be obtained from the Bar Association's Professional Conduct Department on (02) 9232 4055. Where the ethical issue is pressing or particularly serious, this is probably the best source of assistance.
28. The role of the silk in this context is to discuss the ethical question with you and assist you to reach an answer to it. The silk is not able to give you a formal 'ruling'; that process ceased to exist some years ago. If you do wish to have a record of your discussion with the silk – and it is good practice to do so – you must send a letter to the silk recording the facts you disclosed to them and the guidance given. That letter should be sent as soon as practicable after speaking with the silk. A copy of the letter may also be sent to The Director, Professional Conduct.
29. *Secondly*, less formal ethical guidance can and should regularly be sought from your colleagues. One of the bar's great strengths is its collegiality and open door policy; it enables us all to make use of our colleagues' experience and objectivity. You should discuss ethical questions with colleagues in your chambers and within your area of practice; encourage them to approach you with their own ethical questions. An ability to

view a problem objectively will often produce a very easy answer to what – from the inside – appears to be a difficult question.

30. Whichever course you choose to adopt, seek guidance early and always err on the side of caution. As noted above, ethical problems are far harder to resolve than ethical questions.

Avoid nasty surprises when billing

31. Many complaints have as their genesis some level of dissatisfaction about fees, either on the part of a client or your instructing solicitor. This risk can never be avoided but can be reduced by:

- a. giving realistic estimates of your fees;
- b. updating those estimates regularly;
- c. providing a meaningful description of the work for which you are billing;
- d. billing regularly to ensure the value of your work in progress and unpaid fees does not reach too high a value; and
- e. establishing a system that will enable you to achieve (a) – (d) above.

32. When fees remain unpaid – as sometimes happens – any decision about pursuing them should realistically take into account the fact that suing for your fees will almost inevitably result in a disciplinary complaint, cross claim or both being proffered in response.

Communicate effectively

33. Many complaints are attributable to poor communication with, and unrealistic expectations on the part of, solicitors and their clients. You should assume that people will take away from any conferences or any other discussions whatever it is that they want to hear if it is at all possible for them to do so. You should also assume that

people's memory of what you have said to them about a particular matter may change over time depending on the circumstances in which they find themselves. To minimise the risks presented by this, I suggest that:

- a. when providing advice in conference you should be concise and use language that can be readily understood by the person or people you are speaking to. It is important that your client or solicitor walks away from any discussion having understood what you are saying. A client who walks away from a conference believing you are particularly erudite but having understood nothing you have said is a recipe for disaster. To similar effect, you are paid to express your views and not your doubts. Non-committal advice which identifies every possible outcome or permutation and says: 'It might be x or it might be y' is, at best, unhelpful and likely to lead to the solicitor and/or their client seizing upon whichever of the potential outcomes identified is most advantageous to them and reacting badly if it does not come to pass;
- b. on matters of case management you must make very clear what it is you'll be doing and what you expect or need from others. This avoids the common misapprehension that once a barrister is retained everyone else can sit back while the barrister 'sorts it all out'. Left uncorrected, this misconception can only result in your instructing solicitor and/or client feeling let down or disappointed.
- c. you should put things in writing wherever possible. In the contemporary era we have the great luxury of email. It takes very little time to tap out an email confirming important instructions you have received, the advice you have given in conference or your general understanding as to who is doing what and when. It does not need to be a masterpiece and avoids people walking away with any sort of misconception based on what they have 'heard'.

Take particular care when straying from your usual area of practice

34. The risk of a complaint increases when you step outside your usual area of practice. I do not to say that you should confine your practice to a single area; one of the very great benefits of practice at the bar is the ability to develop a broad based practice. However,

if you do branch out, do it carefully. Speak to others who practice regularly in the new area. Do not rely solely on intuition; there are many things about the law and practice which are counter intuitive. Assume that you will need to do a lot more work than usual to get across the new area. Make sure you have sufficient time for this and actually do it.

35. Returning to the theme of billing, you should think very carefully about how much you can fairly charge for getting across a new area of law or practice. There is likely to come a point where time spent learning a new area of law should best be chalked up to self-education of a type which will no doubt pay dividends in the future.

Be particularly alert to conflicts of interest

36. It goes without saying but it is very important that you are alive to the risk of conflicts and where possible concerns emerge you should err on the side of caution.
37. Potential conflicts of interest must be delicately balanced with the cab rank rule. However, where there is real scope for a conflict it is preferable to not accept or to return the brief. It is far better to do this as soon as the potential for conflict is identified; rather than to find yourself in a position down the track when the possible conflict becomes a reality and you are forced to return the brief. At this later stage, you are exposed to the risk of complaints from both your own client and the other party.

Adopt a professional, accommodating and courteous approach at all times

38. An enormous number of complaints would be avoided by close adherence to this rule. Remember it is not your case; you are just there to do your job. It can be frustrating at times but you should take a deep breath and get on with it. There is no need for you to go to war with your opponent, their instructing solicitor or their client. Never belittle, hector or seek to embarrass your opponent or their client when dealing with them, other lawyers, your own client or the court. Sneering, sledging, eye rolling, guffawing, unsolicited criticism and laughter at the expense of others is unprofessional and unnecessary. All of these things are particularly important when dealing with solicitor advocates, more junior members of the profession and self represented litigants.

39. It may seem obvious but litigants and colleagues who feel you are friendly, detached and appropriately accommodating are far less likely to feel aggrieved by your behaviour or make a complaint against you; the corollary applies with equal force.

Take particular care when dealing with self-represented litigants

40. The Bar Association has prepared an excellent handbook addressing the way in which barristers should conduct themselves when dealing with self-represented litigants. It can be found here <http://www.nswbar.asn.au/for-members/publications>. I will not repeat or try to summarise it in this paper. Rather, I strongly suggest that any barrister who knows they will be dealing with a self-represented litigant take the time to read it carefully.

Be alert to the risks posed by direct access clients

41. All of the above is especially important when dealing with direct access clients. You must be on high alert when dealing with a direct access client. It is vital that they understand any advice you provide to them and recognise the limits placed upon what you can do for them and what they will need to do for themselves. It boils down to appropriately managing the client's expectations; despite your best efforts, this may not be possible in every case and this is likely to become a problem.
42. Ultimately, you will need to make a decision about whether or not you wish to do this type of work at all; it is fraught with risk.

Responding to complaints

43. There is no escaping the fact that responding to disciplinary complaints is a personally difficult, costly and time consuming exercise.
44. You must try to remember that disciplinary complaints are just one of the risks of professional practice. Complaints can be and are made against even the leaders of our profession. Some complaints have at their core some piece of conduct which may properly be characterised as unsatisfactory professional conduct or professional misconduct. At other times, a litigant or practitioner will have had an unhappy

experience of the law and for no particular reason will have come to identify you as the human face of that experience.

45. It is difficult but very important that you approach any disciplinary complaint made against you with insight and critical reflection. None of us is perfect. We all do things in the course of our professional lives which – with the benefit of hindsight – we might have done differently. Sometimes those things – when properly scrutinized – might amount to unsatisfactory professional conduct or even professional misconduct. You will respond more effectively to any complaint made against you if you start from this position rather than resorting immediately to outrage and defensive hostility. If nothing else, outrage and hostility will suggest a lack of insight on your part in the event that the PCC or Bar Council forms an adverse view of your conduct; something that may be taken into account in determining the appropriate penalty to impose for it.

46. You should carefully consider notifying your insurer. Obviously it is a personal decision and may have implications insofar as your relationship with your insurer is concerned. However, you should bear in mind that:
 - a. the obligations of disclosure in s.21 of the *Insurance Contracts Act* 1984 (Cth) and more generally mean that you probably will have to notify your insurer, or any new insurer, of the complaint when the time comes to renew your policy;

 - b. responding to disciplinary complaints can be expensive; particularly those which find their way into NCAT. You are far better off getting the benefit of the cover for which you have paid than potentially losing it by failing to notify in a timely manner;

 - c. precisely how the complaint is dealt with as between you and your insurer will depend upon the arrangement you reach with it; which in turn will depend upon the nature of cover you have and any applicable excess. However, where lawyers are retained by your insurer to assist you in responding to the complaint they are generally very experienced, capable, objective and likely to be of significant assistance to you in dealing with the complaint.

47. You need to acknowledge that – however philosophical you might be – you simply cannot be truly objective about the complaint and its subject matter. If lawyers are retained to act on your behalf, listen to them. If not, seek help from a senior colleague.
48. Take all of the relevant material to a senior colleague who is objective and whose judgment you respect. This does not necessarily mean a close friend and is certainly not someone who you know will give you the answer you *want* rather than the answer you *need*. Be completely candid with them and seek their advice and assistance. Do this before responding formally to the complaint. Ask whether they would consider and comment on your response to the complaint before you send it.
49. Finally, you need to look after yourself. Receiving and dealing with a complaint can be a battering experience. If you are struggling, remember that Barcare is there to help you. It is particularly useful in situations such as this and you should take full advantage of the services it provides. Full details can be found at Barcare.org or by calling Penny Johnston on (02) 9331 3872.

5 February 2016

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