



"My final offer!": the ethics of negotiation

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A while ago, the Law Society of New South Wales adopted a succinct Statement of Ethics, now displayed in the Ethics section of their website under this quotation from Riley's NSW Solicitors' Manual:

"The true profession of law is based on the ideal of honourable service."

Subsequently the Law Institute of Victoria adopted a Code of Ethics similarly displayed. Now I believe our own Society is considering the introduction of something similar. Some may ask why do we need another statement of ethics when we have comprehensive legislation and conduct rules as well as practical guidelines published on the Society's website? The short answer is that the law has always been a challenging profession – never more so than now. Technology has made some things simpler, but equally exposed us to greater risk. Lawyers still occasionally lose their way, despite better education programmes. A short statement of core values is surely something that everyone can readily grasp and identify with as the foundation of who we are and what we do.

Some years ago I was part of a Law Society panel discussion on professional ethics with the catchy title of *How far can you go for your client?* One could debate the wisdom of the subliminal suggestion buried within that title, suggesting that professional ethics are all about seeing how much one can stretch the envelope. It certainly attracted a good deal of interest at the time, judging from the size of the audience. The really remarkable thing about that event was the reaction to a paper from one of my co-presenters, whose topic covered practitioners' professional duties during commercial negotiations on behalf of clients. On that occasion it became clear that misconceptions existed about the lengths to which one could go when negotiating for clients, without contravening the professional conduct rules. The discussion addressed the legitimacy of tactics like "poker playing"

or "bluff and double bluff". I recall the point being made that saying "this is my client's final offer", when you know it isn't final at all, is misleading and a breach of the professional conduct rules.

I had assumed that the presentation all those years ago, which included a discussion of His Honour Justice Chaney's reasons in *LPCC v Fleming [2006] WASAT 352*, had put to bed any lingering doubts on the issue – but apparently not. Even now there are apparently still some people laboring under a severe misapprehension that commercial negotiations are somehow an "honesty free zone" (to coin the phrase used by the Queensland Legal Services Tribunal in *LSC v Mullins [2006] LPT 012*) and consequently, in some inexplicable fashion, free from the scrutiny of the court. Nothing could be further from the truth. The lesson of *Fleming* is that practitioners owe duties to each other, quite apart from and in addition to their duties to the court and their clients.

Practitioners should read Justice Chaney's reasons, but, to make it even easier, this month's *Brief* contains an important feature by Steve Standing bringing us up to date on this topic. It reminds us of the artificiality – and impossibility – of attempting to segregate aspects of our professional lives into 'professional' and 'commercial' parts quarantined from each other. The absurdity of compliance with ethical and professional standards being switched on and off like so many lights, depending on whether one is acting for clients 'professionally' or 'commercially', is patently obvious. This has special resonance for commercial negotiations, where professional reputations can be made or unmade literally in an instant.

Negotiations are part and parcel of what we do every day. So more is required from us than mere adherence to the black letter of the law or the professional conduct rules. Critically for an arena where professional relationships rely so much on personal trust between colleagues, compliance with the spirit of

the law is an absolute prerequisite.

Our features this month include an article by Bertus de Villiers. With his wealth of practical experience as a senior member of SAT, Bertus has written about conferral between expert witness and the leading of concurrent evidence, interestingly, from the experts' perspective. Stefan Sudweeks and Philip Lovatt have addressed issues concerning the much-litigated section 54 of the *Insurance Contracts Act* and its uncertainties. Then we have an article by Simon Haag and Sarah Brady, on the unusual topic of the rights of offshore resources workers, entitled *Battle on the High Seas*. There is also a contribution sure to be of interest to aspirant research clerks and seasonal clerks – and perhaps their employers too – on employers' obligations to interns, by Janine Webster.

We also publish a note from the LPCC on practitioners' duties regarding client testamentary capacity. The note is compulsory reading, especially for those who practise in wills and probate. It will have resonance for all concerned about a client's capacity to give instructions. Our new 'Meet the Committee' column this month features the Employee Relations Committee. Our book reviews this month cover topics as diverse as the *Coroner's Manual*, reviewed by Raoul Cywicki and *Climate Change and Coastal Development*, reviewed by Brad Wylynko. These reviewers bring to bear a wealth of experience in these areas. Last but not least, I am delighted that our young lawyers have contributed a series of case notes on eclectic topics of interest to our readers. YLC's contributions to *Brief* are now a regular feature, for which we are profoundly grateful.

Brief welcomes your thoughts and feedback.

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