

# LPC Current Issues

## Professional Obligations when Practitioners Act for Themselves

### Legal Profession Complaints Committee

Most disciplinary matters involve a practitioner's conduct when acting for a client. However, legal practitioners are officers of the court at all times and their ethical obligations can extend to personal disputes. In particular, legal practitioners can breach their professional duties by using their status as practitioners to gain a personal advantage at the expense of lay persons, especially if this leads to intimidation. The 'delicate balance' between legitimate pressure and improper intimidation<sup>1</sup> is real and important.

Recently, the State Administrative Tribunal (SAT) stated that it would be "contrary to the intent of the Conduct Rules for a lawyer to be subject to the stated ethical requirements when acting for another person, but not when acting for themselves."<sup>2</sup> In that case SAT considered a practitioner's conduct arising from proceedings commenced by the practitioner in SAT against her neighbour relating to a strata unit dispute. The proceedings were referred to and then settled at mediation on the basis that the practitioner would withdraw the SAT application. The practitioner subsequently sought and was granted leave to withdraw the application. Under the *Strata Titles Act 1985*, the practitioner was not permitted to apply for costs and she did not do so. Consequently no order as to costs was made by SAT. The practitioner then sought recovery from her neighbour of the legal costs that she had incurred and paid to her own lawyers in respect of the dispute and eventually commenced proceedings in the Magistrates Court (Minor Case Claim) against her neighbour seeking recovery of these costs.

Following the investigation of a complaint made by the neighbour under section 410(1) (e) of the *Legal Profession Act 2008*, the LPCC commenced disciplinary proceedings in SAT against the practitioner. Before SAT, the practitioner contended that in demanding payment and in commencing the Magistrates Court proceedings she was "acting in her personal capacity and was not acting in her capacity as a legal practitioner engaged in the course of legal practice."<sup>3</sup> In this regard the practitioner contended that being a minor case in the Magistrates Court neither party could be legally represented without leave and leave had not been sought

or granted. The practitioner maintained that she was merely exercising "her rights and responsibilities as a private citizen acting reasonably." Further, the practitioner maintained that, at the time of her commencing the Magistrate Court proceedings, her terms of employment exempted her from the requirement of compulsory professional indemnity insurance on the basis that she undertook not to practise as a legal practitioner other than in the course of her employment.

Unsurprisingly, SAT determined that whether or not the practitioner was "acting as a lawyer" was not the critical issue, and that, notwithstanding that the practitioner was acting in her personal capacity, the "umbrella requirements" of professional conduct applied. SAT referred to and applied dicta in an earlier decision, noting that unprofessional conduct on the part of a legal practitioner may extend to conduct by the practitioner in a private capacity and that legal practitioners, in all of their dealings, are bound by the fundamental duties of fairness, honesty and propriety.<sup>4</sup> These duties owed by a practitioner apply to all conduct even if the practitioner is a specialist in another area of legal practice and has no or limited experience in the jurisdiction in which he or she is engaged.<sup>5</sup> Even an honest mistake of law does not excuse conduct that breaches these fundamental duties.

SAT found that in making a demand against the neighbour when he could not have had a liability to pay the practitioner's legal costs, and in threatening to, and then commencing the Magistrates Court proceedings, the practitioner engaged in professional misconduct. The practitioner breached duties of fairness and propriety, which she owed to the neighbour and to the Magistrates Court as a legal practitioner engaged in a legal dispute and in a legal proceeding. Her conduct was "clearly intended to apply inappropriate and improper pressure"<sup>6</sup> on the neighbour to pay the legal costs. SAT considered the importance of the observance of a legal practitioner's fundamental ethical obligations including not engaging in conduct (in the course of providing legal services or otherwise) which may be prejudicial to the administration of justice (*Conduct Rule 6(2) (b)*) and conduct which may bring the profession into disrepute (*Conduct Rule 6(2) (c)*).

In noting that at the time of making the demand the practitioner had no entitlement to any legal costs, SAT referred to the general proposition (as confirmed in *Conduct Rule 18(1)*) that a legal practitioner must not, on a client's behalf, demand the payment of any costs from another person unless the client has a right to recover those costs. This obligation not to demand payment in the absence of an existing liability to pay "is no less the case where the lawyer demands payment on behalf of himself or herself, rather than on behalf of a client."<sup>7</sup> SAT confirmed that "The case of misconduct is arguably all the stronger when it is the practitioner's own position which he or she is seeking to advance by such an unfair or improper demand."<sup>8</sup>

Although the practitioner did not write the letter of demand seeking recovery of her legal costs on her professional letterhead, the neighbour was aware that she was a lawyer and SAT considered that there was a "clear implication"<sup>9</sup> from the letter of demand that the neighbour had an obligation to pay the demanded amount. A letter sent by a practitioner in a personal dispute that expressly or implicitly uses their professional status to intimidate another person can amount to "improper intimidation". This decision serves as a reminder that legal practitioners owe a paramount duty to the court in both their professional and personal dealings and that practitioners must be prudent about where and when to apply their legal professional status. It is also a reminder that the professional obligation of "complete truthfulness and absolute candour"<sup>10</sup> is not diminished where practitioners are acting in their personal capacity.

#### NOTES

1. *Legal Services Commission v Sing* [2007] 2 Qd R 158 at [29]-[30].
2. *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 at [58].
3. Amsden at [59].
4. *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 at [15].
5. A legal practitioner at [22].
6. Amsden at [50].
7. *ibid.*, at [46].
8. *ibid.*, at [46].
9. *ibid.*, at [51].
10. *Legal Profession Complaints Committee and Segler* [2010] WASAT 135 at [69].