

Testing your client's story – an ethical obligation (and sometimes a professional courtesy)

One of the fundamental obligations of solicitors – and indeed very much the reason for our existence - is independence.¹ Both our clients and the courts rely on us to bring a forensic consideration to our client's matter.

We cannot expect our clients to present their side of the story in an unbiased or even-handed manner. They are emotionally invested in both the outcome and the events which have lead them to your office. It is imperative that we carefully examine the evidence, test our client's version and obtain verification of it if at all possible.²

This is doubly important if our client has come to us from another solicitor, and is alleging negligence or improper conduct on the part of their former legal representatives. Clients who change lawyers mid-matter generally do so for a range of reasons which may involve a level of acrimony, and can often involve the amount of legal costs incurred by the client. Such circumstances can be a red flag, and if allegations against a former solicitor or barrister are being raised, verification must be sought.

In addition, practitioners who are so instructed should, as a matter of professional courtesy, raise the issue with the impugned lawyer and allow them to consider the allegations and respond. In addition to ensuring that invoking the powers of the court is reasonably justified,³ it allows our fellow practitioner an opportunity to respond. If the circumstances were reversed, we would no doubt like to be afforded that same courtesy.

The High Court recognised the importance of independence in *Bell Lawyers Pty Ltd v Pentelow*⁴ citing with approval Brereton J's comments in *McIlraith v Ilkin (Costs)*:⁵

Where a solicitor represents a litigant, the court is entitled to expect the litigant to be impartially and independently advised by an officer of the court.

To move forward on the basis of incorrect material from a client is embarrassing and can lead to disciplinary action;⁶ it is a serious allegation to malign or accuse a fellow officer of the court of misconduct or negligence and a betrayal of the collegiality at the heart of our profession. It is a course of action prudent, ethical practitioners should seek to avoid.

Shane Budden

Ethics Solicitor, QLS Ethics and Practice Centre
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¹ *Australian Solicitors Conduct Rules 2012* (Qld) r 4.

² *Ibid* r 17.

³ *Ibid* r 21.

⁴ [2019] HCA 29, [19].

⁵ [2007] NSWSC 1052, [25].

⁶ See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186. See *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* [1998] FCA 806.