

Pay up or I'm Telling!

No, you're not; the Legal Services Commission is not a bargaining chip

Those of us of a certain vintage recall a time when certain points of professional courtesy were understood and strictly observed, regardless of whether or not they were enshrined in conduct rules or legislation. Things like not quoting legislation in correspondence to other solicitors, or engaging in litigation by correspondence, were handed down from our masters during our Articles of Clerkship like wisdom from tribal elders.

Perhaps chief amongst these unofficial rules of practice was that reporting another solicitor to the authorities-in those days, ironically, the Law Society itself-was an absolute last resort. Disputes between practitioners, or intractability on the part of a solicitor in a particular matter, were often resolved by the intervention of a mutual friend and reliance on the general collegiality of the profession.

This was not to do with some 'secret society' style pact to refrain from dobbing in your own (because of course sometimes it was necessary to do so) but rather recognition of the severity of the consequences and the enormity of any accusation. Taking the step of reporting another practitioner meant that resolution of a problem had proved impossible, or that the practitioner in question had crossed a very definite line and involving the regulator had become unavoidable.

What was definitely off the cards-indeed, considered beneath the dignity of a respectable practitioner-was to use the possibility of an official complaint during negotiations to resolve client disputes. A practitioner engaging in such an act would likely get a stern dressing-down from his or her own firm, and seriously damage their professional reputation.

Sadly, we live in less enlightened times, and the emergence of an aggressive style of litigation has given rise to a growing practice of threatening to complain to the Legal Services Commissioner (LSC) in an effort to persuade opponents to accept offers, concede points or even discontinue an action. Incredibly such threats are often put in writing.

Practitioners should bear in mind that such actions are in direct contravention of Rule 34 of the Australian Solicitors Conduct Rules 2012, which provides:

34. Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

Threats to report an opponent to the LSC are within the ambit of Rule 34.1.2 and are likely to also offend Rule 34.1.3. The prohibition is unambiguous and no amount of careful or facile phrasing will circumvent it.

It should also be evident that this rule should not be needed in a true profession, as genuine professionals would not contemplate such a course of action. For solicitors this is even more evident, as to threaten an LSC complaint to obtain an advantage for a client (or the practitioner issuing the threat) is to enter a labyrinth of conduct rule violations.

Consider a threat to go to the LSC unless the defence of a debt recovery proceeding is discontinued and the sum sought paid. The solicitor issuing the threat-in addition to breaching Rule 34 and the paramount duty to the administration of justice¹-is inviting the target of his threat to also violate the paramount duty, as well as place their interests ahead of their client's² and to act dishonestly.³

If the matter were settled pursuant to the threat, both practitioners would also be misleading the court⁴ (note that this would be true even in mediation and dispute resolution proceedings as the definition of *court* in the ASCR includes them⁵) and almost guarantee, rather than exclude, the involvement of the LSC.

There are few courses of action which can violate so many conduct rules in one fell swoop, and any practitioner foolish enough to engage in these threats can expect no sympathy from the courts when delivered up for justice. The LSC is not a bogeyman for use in settlement negotiations, nor is it interested in settling spats between solicitors. If a practitioner is being frustrated by an intractable or recalcitrant opponent, the QLS Ethics Centre has a number of options-including the QLS Senior Counsellor's Service, the Non-Binding Ethics Ruling process and the ability to assist a practitioner to facilitate discussions with another practitioner, if circumstances permit; these options will be of far more help than threats, and won't lead to disciplinary proceedings.

Shane Budden
Ethics Solicitor
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¹ Australian Solicitors Conduct Rules 2012 (ASCR), Rule 3.

² Ibid, Rule 4.1.1.

³ Ibid, Rule 5.

⁴ Ibid, Rule 19.

⁵ Ibid, Glossary of Terms.