Getting Up Close and Personal

Upholding the Letter and Spirit of the "No Contact" Rule

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As far back as 1847 it had been judicially remarked that "[a]ny communications which the solicitor of one party has with a party opposed to him in the cause is extremely unprofessional". [1] So well before translation of an equivalent sentiment into the professional rules, [2] it was an accepted principle of proper professional conduct that a lawyer should not, generally speaking, communicate directly with the client of another lawyer in respect of a matter in which the lawyers were engaged.

The chief justification for the so-called "no contact" rule is to prevent a lawyer from circumventing the protection that legal representation provides to an opposing party. Direct access to the opposing party could, it is feared, allow the lawyer to inappropriately secure damaging admissions from that party, access privileged communications, or undermine that party's trust in his or her lawyer. If so, the value of legal representation for the opponent is arguably significantly reduced.

Although the no contact rule has traditionally been viewed as creating only a professional prohibition, as opposed to one the breach of which affords a private cause of action against the infringing lawyer, its breach can generate legal consequences. A court faced with a breach may, for instance, rule inadmissible evidence gathered as a result, [3] order the return of documents and notes, [4] or even order the disqualification of the lawyer in the proceedings. [5] Of course, contravening the rule is likely to generate a professional disciplinary response, although it is unlikely by itself to attract suspension or striking off. [6]

The no contact rule provides a useful reminder of the importance of viewing ethics "rules" not as statutory pronouncements but as statements of principle. To attempt to structure communications to fall outside the literal terms of the rule, while at the same time infringing its substance, shows little regard for the applicable ethical norm. Adopting an ethically "holistic" approach to the no contact rule reveals itself in a variety of ways.

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For instance, the proscription should be seen to extend to agents of the lawyer in question. A lawyer who, instead of making direct contact with an opposing client, instructs an agent to do so, arguably breaches the spirit of the rule. Also, although the no contact rule does not prevent a client directly making contact with an opponent, for lawyers to "word up" a client to make that contact in a manner inconsistent with the spirit of the no contact rule makes it difficult to distinguish between a lawyer instructing an agent to make the communication and the like instruction of the client. The issue then arises as to whether a lawyer, who is either a client in a matter, or self-represented, breaches the rule by approaching an opponent directly. In a 1995 ruling, the New South Wales Law Society's Ethics Committee said that: [7]

> *"… a solicitor who is a party to a matter is not necessarily precluded from contacting a party on the other side who has a solicitor acting – as long as the contacting solicitor does so in a personal capacity and does not seek, as a solicitor, to influence the other party."*

Yet as a matter of good practice, a prudent lawyer-litigant will eschew direct contact with the client of another lawyer. For an opponent, the distinction between a personal and professional capacity may prove illusory and there consequently may remain the prospect that the lawyer could influence the opponent illegitimately. Some American case law, to this end, supports the view that lawyers cannot divorce their professional from their private selves and so should be deprived the right of laypersons to speak directly with the opposing client. [8] And more recently the New South Wales Administrative Decisions Tribunal ruled that a lawyer-litigant who contacted the opposing party by impersonating the lawyer acting for that party – in an attempt to secure information about discoverable documents from the opposing party – had breached the "rationale and spirit" of the no contact rule and was guilty of professional misconduct as a result. [9]

Even the absence of direct contact with an opposing client does not necessarily circumvent the no contact rule. Attempts to undermine an opponent's trust in his or her own lawyer by indirect means are unprofessional. Where, in a 2008 New South Wales case, [10] the defendant's lawyer prepared and disseminated

a discussion paper intending that its contents should come to the plaintiff's attention, McDougall J saw this as aimed at persuading the plaintiff without proper advice to abandon its proceedings, which his Honour characterised as "underhanded and wrong". [11]

It is important to realise, to this end, that the public perception of the profession stems not only from clients' dealings with their own lawyers, but in perceptions of opposing lawyers' ethics.

Notes

1. *Jones v Jones* [1847] 5 Notes of Cases in the Ecclesiastical and Maritime Courts 134 at 140.
2. See *Professional Conduct and Practice Rules 1995* (NSW) r31; *Professional Conduct and Practice Rules 2005* (Vic) r25.
3. See, for example, *Faison v Thornton* [1993] 863 F Supp 1204.
4. See, for example, *State ex rel Pitts v Roberts* [1993] 857 SW 2d 200.
5. See *Nauru Phosphate Royalties Trust (recs and mgrs apptd) v Business Australia Capital Mortgage Pty Ltd (in liq)* [2008] NSWSC 833 at [36]-[38] per McDougall J.
6. See, for example, *Re Pursley* [1995] 4 LPDR 5 (significant fines imposed on two solicitors); *Legal Services Commissioner v Bradshaw* [2008] LPT 9 [affd *Legal Services Commissioner v Bradshaw* [2009] QCA 126] (lawyer reprimanded and ordered to undertake continuing professional development in ethics and practice management).
7. See V Shirvington, "Communications: a Perennial Problem (Part 1)", May 1995, 33 *LSJ* 20.
8. See, for example, *Sandstrom v Sandstrom* [1994] 880 p.2d 103; *Runsvold v Idaho State Bar* [1996] 925 p.2d 1118.
9. *Legal Services Commissioner v Hurley* [2009] NSWADT 125.
10. *Nauru Phosphate Royalties Trust (recs and mgrs apptd) v Business Australia Capital Mortgage Pty Ltd (in liq)* [2008] NSWSC 833.
11. *ibid.*, at [35].

Fees and Risk Management

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Over the years I have constantly reminded practitioners that the best way to get sued is to sue for your fees. Many a time a firm has issued proceedings against a former client to recover a relatively modest amount for fees only to be confronted with a counterclaim for negligence, which has some merit. The practitioner then faces not only being unable to recover the outstanding fees, but also may have to pay an excess in settlement of the claim and, in some cases, to refund some of the fees the client has already paid. I have not even included in this assessment the time lost and energy incurred by the practitioner in defending the counterclaim.

Over the last 12 months there has been an increasing amount of claims notified to Law Mutual (WA) which began with the firm issuing proceedings to recover outstanding fees.

Counterclaims for negligence arising from proceedings to recover fees are difficult and costly to manage. Liability to recover or repay fees and disbursements is excluded under the Certificate of Insurance. Whilst a counterclaim for negligence does come within the policy, there is an inherent conflict between the firm and the insurer when conducting the litigation. Therefore, it is only in exceptional circumstances the insurer will take over the conduct of the litigation and the firm usually has to brief counsel or an independent solicitor to run both aspects of the claim. The costs relating to the counterclaim may be recovered under the policy but the costs relating to the recovery of fees will not.

Therefore, if you have outstanding accounts, think carefully before issuing proceedings. Unpaid fees often reflect client dissatisfaction. What steps can you take?

- Talk to your client and try and understand why the account is unpaid. Listen so you can understand the source of the problem.
- Be prepared to compromise or attend a mediation, especially if there may be some merit in the client dissatisfaction, even if in law it would not be grounds for a claim for damages.
- Explain all the work that has been done to try and justify your account. Sometimes it is not obvious to the client.
- Respond *quickly* to any questions and concerns by your client.
- Has the client the funds to pay the account? Many a time a practitioner notifies of a counterclaim for negligence and admits the client did not have funds, or the only asset is a home owned jointly with a spouse and enforcement of the debt will be difficult.

Managing fees is an important step in minimising the risk of a claim. Practitioners should adopt a preventative approach to billing by discussing fees with client at the outset and be alert to situations when the anticipated fees are being exceeded. It is preferable to bill on a regular basis in amounts that are manageable to the client. Be aware of delays in payment of accounts as it may be a sign of client dissatisfaction, which could be resolved if dealt with quickly.

In future articles I will discuss other aspects of fee recovery that can be the cause of claims against practitioners – for example, liens and terminating a retainer for non-payment of fees.