



Legal Practitioners

Conduct Board

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INFORMATION FOR SOLICITORS

1. What Is the Legal Practitioners Conduct Board?

The Board was created under the Legal Practitioners Act, 1981 ("the Act"). It is an independent body separate from the Law Society of South Australia.

The Board's office is at Level 3, 33 Franklin Street, Adelaide. The Board is the legal profession's regulatory body.

The establishment, functions and work of the Board before the Legal Practitioners Disciplinary Tribunal and the Supreme Court are set out in Part 6 sections 68 to 90A of the Act.

2. Current membership and staff of the Board

The Board comprises seven members – four of whom are lawyers and three lay persons. The Board in meeting votes and decides on reports, information and evidence collected and compiled by solicitors who investigate matters for the Board.

Copies of the Board's Annual Reports are available from the website www.legalcomplaints.com.au.

Any contact with the Board is through the staff of the Board. Contact details appear at the end of this information sheet.

3. What are the functions of the Board?

The functions of the Board are set out in section 74 of the Act. They are:

1. To investigate allegations of misconduct (in this information sheet misconduct refers to unprofessional and unsatisfactory conduct and both terms are defined in the Act in section 5).
2. To deal with misconduct, if relatively minor misconduct pursuant to section 77AB of the Act or to lay charges before the Legal Practitioners Disciplinary Tribunal.
3. To deal with complaints of overcharging.
4. To arrange for conciliation of complaints.
5. To commence disciplinary proceedings before the Supreme Court if appropriate.

4. Board's Obligation To Investigate

The Board is obliged to conduct an investigation if a complaint is made to it. It has no option unless the complaint is frivolous or vexatious or unless the complaint has resolved prior to commencement or completion of the investigation. Please refer to section 76(1a) and 77A of the Act.

5. How Is An Investigation Conducted?

The Board receives a significant number of enquiries by telephone. Where appropriate an attempt will be made to address the enquirers concerns informally at an early stage. The Board's solicitors cannot and will not give legal advice to any caller.

Concerns raised by enquirers may be informally conciliated by the Board's conciliators and this process may include contact with the legal practitioner, generally by telephone.

If a complaint is made to the Board about a legal practitioner, an investigation will be commenced.

The commencement of an investigation does not mean that anyone employed by the Board necessarily accepts the veracity or completeness of the allegations or information. Until the investigation is finalised the Board members who make the decisions usually do not know about it.

The Board pursuant to section 75 of the Act has delegated some of its powers and functions to the Director and Deputy Director and staff of the Board. A decision in relation to a complaint may be made pursuant to the delegated authority.

A prompt and detailed response from a legal practitioner may result in early clarification of the matters complained about and early advice to the Board for finalisation, or the Director or Deputy Director for decision pursuant to the delegated authority.

A complaint can be made by anyone, not necessarily a client of the legal practitioner. When a complaint is made about a legal practitioner representing a person who is in dispute with the complainant, issues of legal professional privilege and ulterior motive may effect the action taken (if any) by the Board.

The Act does not prescribed a time limit in which a complaint must be made however it may be a factor in the Board's investigation or in its assessment of the matter.

The Board does not automatically publish a complaint to a legal practitioner. Some complaints are not published to the practitioner concerned at all, although in the ordinary course of events you will be notified that a complaint has been made.

The Board is aware that sometimes a complainant will try to use the Board's processes to avoid responsibilities towards the practitioner in relation to payment of costs.

Consequently, where legal action has been initiated either for the recovery of costs or in relation to other matters, and conciliation is not appropriate, the Board may suspend its own investigation until those issues are concluded before the Court.

The length of an investigation is influenced by a range of factors including the multiplicity and complexity of issues, the volume of documentation in relation to the matter and the time taken to respond to the Board by either the practitioner, the complainant or others.

6. Response to the Board

When the Board's investigating solicitor seeks a response from a legal practitioner there is no preconception that there is any impropriety on the part of the practitioner. We are simply seeking the practitioner's version of events, which may include a response to particular questions. Often a matter will be adequately explained and finalised after receipt of an explanation and copies of relevant documents from a practitioner. The Board does not consider any complaint until the investigating solicitor has given the legal practitioner and the complainant an opportunity to comment on any information that is disparate.

However, you do need to respond to the Board. Do not ignore letters or phone calls from the Board. That in itself may amount to misconduct.

Do not respond in anger. Keep in mind that your letters will not only be seen by the complainant, but by the Board Members (and perhaps others if the matter were to proceed to a Tribunal or Court). Notwithstanding that a practitioner may feel frustrated, upset or angry upon receiving a complaint, courteous communication with the Board is expected and advisable.

Respond succinctly to the issue and send relevant documents, if appropriate.

A reading of the Annual Reports on the Board's website will disclose that over 90% of complaints are finalised with no finding of misconduct against the practitioner.

7. Requesting more time to respond

If you feel inadequate time has been given for you to respond please contact the Board's solicitor. We will accede to reasonable requests for an extension of time although a matter cannot be allowed to remain unanswered indefinitely.

8. Transparency of Investigation

The investigating solicitor will usually refer the practitioner's response to the complainant, and any further correspondence from the complainant to the legal practitioner the subject of the investigation unless either indicates that they do not wish the correspondence to be shown to the other. Good reason is needed for non-disclosure to occur. The Board's investigation must not lack procedural fairness. It is preferable for all concerned if correspondence is in a form which can be shown to the other party to allow appropriate comment on the material.

On occasions, as part of the investigation the investigating solicitor may call for the practitioner's file or speak to other witnesses and take statements from them.

9. A practitioners professional obligation to assist the Board

The Full Court has indicated that a practitioner has a professional obligation to assist the Board with its inquiries.

See *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434

“...A practitioner whose conduct is the subject of an inquiry by the Board has a duty to assist the Board in its inquiries: Johns v Law Society of New South Wales [1982] to NSWLR 1 at 6, Re Veron; ex parte Law Society of NSW (1966) 84 WN (Pt 1) (NSW) 136 at 141-142. That does not mean that the solicitor must disregard his own interests. But it does mean that there is an obligation upon the solicitor to respond to reasonable requests for information, particularly when one takes into account the fact that often the solicitor will have a better knowledge and understanding of the matter, the subject of the complaint, than will the client who complains.”

10. Be frank and honest with the Board

Practitioners should be frank and completely honest in all dealings with the Board or the Legal Practitioners Disciplinary Tribunal.

Two Judgments of the Full Court of the Supreme Court refer to this issue.

In the matter of *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467 the Court noted that the response given by the practitioner was an attempt to and did in fact mislead the Board. The Court found that this conduct in itself was unprofessional.

In the matter of *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454 the Court referred to a “persistent disregard of proper enquiries and demands from the Board together with the aggravating behaviour before the Tribunal”.

11. The Board's compulsory powers

The Board has compulsory powers to require a response from a practitioner the subject of investigation (refer section 76(4a)). The Board can also require production of documentation and seize documentation pursuant to Notices issued under section 76(3) of the Act.

These powers are generally used as a last resort by the Board, and usually after attempts to secure a response or the production of documents have failed.

Such Notices are also used on occasions where practitioners request them in situations where legal professional privilege is an issue; for example when the complainant is not the client of the practitioner. Please refer to section 95C of the Act in relation to self incrimination and legal professional privilege.

Failure to comply with a Notice may amount to an offence

If a Notice is not complied with, then the failure may amount to an offence. The prescribed penalty under section 76(4) of the Act, is a fine not exceeding \$10,000.00 or imprisonment for one year.

In 2002 the Crown Solicitor's Office brought a prosecution against a practitioner for a breach of two Notices issued by the Board. The Court sentenced the practitioner to four months imprisonment but suspended the sentence on certain conditions including entering into a two year good behaviour bond.

12. Who can provide you with assistance to prepare a response for the Board?

The Board's solicitors can explain the Board's processes and procedures, but cannot give advice to you on the terms of a response to the Board. Many practitioners, including those at the independent bar, have made themselves available to assist practitioners. The PAPA panel of the Law Society or the Bar Association of South Australia will provide assistance to practitioners in such circumstances.

Advice may also be obtained from Professional Standards at the Law Society.

Contact details for support services for legal practitioners available through the Law Society of South Australia

1. Professional Standards

The Professional Standards section may be able to assist with advice relating to legal practice and practitioners duties.

For further information contact:

The Director
Professional Standards
Phone: 8229 0229
Fax: 8410 5688

2. Law Care

Law Care offers a counseling service with a general medical practitioner.

For further information contact the Law Society on (08) 8229 0222.

3. The PAPA Panel

The Personal And Professional Assistance Program is an adjunct service to the Law Care counseling service.

For further information refer to the Law Society's website, www.lawsocietysa.asn.au or contact the Law Society's Executive Director, Ms Jan Martin on (08) 8229 0222

13. Confidentiality obligations of the Board

On occasions practitioners have expressed concern about whether others may be able to access information held by the Board, especially in relation to complaints against a particular practitioner. The Board is very conscious of the strict confidentiality provision of section 73 of the Act which binds both Board members and staff of the Board. Board members and staff will not divulge information except in the circumstances outlined in the Act.

14. What about legal professional privilege?

The Board adopts the view that if it is your client who has complained to the Board then there is an implied waiver of privilege insofar as you responding to the complaint. If you are in any doubt you may wish to obtain your own advice in that regard. On occasions complaints are made by persons other than your client. Your client's privilege is not abrogated. If a response to the Board would require your client to waive privilege, or disclosure could prejudice your client you should notify the Board of that.

Section 95C of the Legal Practitioners Act addresses the question of self incrimination and legal professional privilege, and broadly indicates that it is not an excuse for a person to refuse or fail to answer a question, or to produce a document as required under the Act on the ground of either self incrimination or legal professional privilege. Section 95C provides protection by making matters compulsorily disclosed to the Board or Tribunal inadmissible in other proceedings.

On occasions practitioners have preferred that the Board formally issue a Notice compelling them to provide information or documents to the Board in such circumstances (refer section 76(4a) and 95C of the Act).

15. What happens once the investigation is complete?

The solicitor investigating the matter will prepare an advice to the Board. The Board is presented with the advice of the investigating solicitor, and copies of relevant correspondence and material. The Board is fully informed and reaches its decision, after discussion, consideration and majority vote. On occasions the Board Members direct that further investigation be carried out, or advice from counsel at the independent Bar be obtained.

The Board's decisions can result in:

- (a) No further action and no adverse finding concerning a practitioner's conduct.
- (b) Charges being laid before the Legal Practitioners Disciplinary Tribunal.
- (c) If there is evidence of minor misconduct (and only with the consent of the legal practitioner) a reprimand, an order that the legal practitioner undertake training or counseling, or an order that the practitioner make a payment or an order imposing a condition on a Practising Certificate, may be made by the Board (section 77AB).
- (d) A recommendation that a lawyer's bill be reduced or an amount paid be refunded.

16. Conciliation

Conciliation is a significant function of the Board.

Complaints received by the Board are always assessed to determine whether conciliation is appropriate for resolution of matters in dispute. Resolution between the parties often results in no further action being taken to investigate the complaint.

If there is evidence of recurrent or serious misconduct, any conciliated resolution inter partes will not preclude investigation of conduct or disciplinary action by the Board.

Conciliations are not conducted by the Board Members, or by the investigating solicitor. If the complaint or initial investigation discloses a relationship problem, a communication problem or a costs dispute the matter may be referred to a qualified mediator if all concerned agree.

Nothing that occurs at a conciliation conference is disclosed to the Board Members or the investigating solicitor. The records of the mediator are sealed. If agreement is reached the Board Members and the investigating solicitor are informed of the agreement.

Pursuant to section 77B(6) it is unprofessional conduct for a practitioner to contravene or fail to comply with the terms of an agreement reached following conciliation at the Board. Please refer to the terms of section 77B of the Act in relation to conciliation.

17. Complaints of overcharging and cost assessment by the Board

One of the functions of the Board is to receive and deal with complaints of overcharging. The Board's functions powers and obligations are set out in section 77A of the Act in relation to complaints of overcharging.

The Board does not have jurisdiction to investigate complaints in relation to party and party costs; that is complaints by one party in relation to costs orders or claims for costs by the other party.

Often to investigate allegations of overcharging the investigating solicitor from the Board will request the production of the practitioner's file. The practitioner's file may be referred for assessment by a cost assessor engaged by the Board.

The purpose of obtaining an assessment from a cost assessor is to have someone look at the bill against the file and provide the Board with an opinion as to whether there has been overcharging or any instances of overcharging. As part of the assessment the cost assessor will consider the validity of the retainer agreement between the firm and the client.

It should be noted that the cost assessor is providing an opinion for the Board in relation to the bill levied and is not performing a taxation of costs or preparing a bill in taxable form. As the assessor is not assessing costs at large, they will consider and report with respect to the bill or bills rendered by the practitioner.