

# Rule 6.1 CPD

Common Problems and Pitfalls for  
Solicitors in private practice.

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# Session overview

By the end of this session, you will:

- understand **law practice structures** as defined in the Uniform Law;
- recognise the **responsibilities of principals** of all **law practices** to ensure compliance with statutory and professional obligations;
- be familiar with **some common problems and pitfalls** faced by NSW solicitors in private practice.



# Practice structures

- law practice defined s6 Legal Profession Uniform Law
  - sole practitioner
  - law firm
  - community legal service
  - incorporated legal practice (ILP)
  - unincorporated legal practice (ULP)

# Sole practitioner



# Law Firm Partnership



# Incorporated Legal Practice

A company must provide at least 14 days notice to the Law Society [Registry] before it engages in legal practice. (S104 Uniform Law)



# Unincorporated Legal Practice



# Principals must take reasonable steps to ensure compliance - s34 Uniform Law





# What are 'reasonable steps' ?



# Reasonable steps 'managing and supervising'



# Reasonable steps ‘Policies and Procedures’

Implement Law **Practice policies** for the delivery of legal services .

Implement Law **Practice procedures** around the Uniform Law, the Uniform General Rules and the Solicitors’ Conduct and Practice rules, for the delivery of legal services.



# Develop systems around high risk categories

- Communication
- Delay
- Liens/file transfers
- Cost disclosure/billing practices/termination of retainer
- Conflict of interests
- Records management
- Undertakings
- Supervision of practice and staff
- Trust account regulations



# Beware the unwritten rules!

Management systems are not only written guidelines or rules but the unwritten rules for the way things are done!



# Common problems and pitfalls

Problems are often caused by a failure to take ‘reasonable steps’ to manage compliance issues.

Four vulnerable areas of legal practice:

- communication
- receipt and disbursement of trust money;
- providing undertakings;
- exercising reasonable supervision.

# Communication

Do you really communicate with your client or is it an illusion?



# Communication problem?

*“The single biggest problem in communication is the **illusion** that it has taken place.”*

*—George Bernard Shaw*





# Communication

## Causes of Law Cover claims - 2018

- Poor communication with clients 38%
- Document problems 20%
- System Problems 12%
- Not knowing law adequately 16%
- No negligence but cannot prove it 11%
- Others 7%

# Solicitors communication skills?

Communication skills covered **in law schools** tend to centre around **earlier cases** and arguments that judges found persuasive or otherwise.

## **Conversely**

Communication skills that are required **outside of the courtroom** are sometimes more critical to the practice of law.

# How does a communication problem occur?

Often because the law practice has no set guidelines or internal systems for:

- taking instructions, making costs disclosures, explaining costs agreements, drafting concise retainer letters in terms that clients can understand or transferring files to another law practice;
- providing legal advice (verbal and written), preparing legal documents such as, statements of claim or submissions, briefing counsel;
- providing advocacy services to clients by **appearing** in courts and tribunals on their behalf.



# Consequences - Failure to communicate can be 'unsatisfactory professional conduct'

## In **Law Society of NSW v Carbone [2009] NSWADT 20:**

- failure to communicate with **another solicitor** continued for far too long as to be classified as discourtesy;
- if such failures were common it would adversely effect the routine conduct of business and legal affairs and the administration of justice;
- impossible for a member of the public to change solicitors, if request to do so is ignored.

Tribunal found that the failure of the Solicitor to communicate was **unsatisfactory professional conduct.**

# ***Sewell v Zelden* [2010] NSWSC 1180**

- **Justice Rein delivered judgment in a dispute between a client and his former solicitor;**
- **crucial issue whether or not a particular conversation took place?**



# The court found

The court found that “*when important advice is given orally by a legal practitioner, a failure to follow up that oral advice with a letter, or at least a file note, is extraordinary and sufficiently remarkable as to induce doubt whether the advice was given at all.*”

On the facts the solicitor had:

- no diary notes;
- no letter from him to [the client];
- no follow up of **important oral advice** with a letter, or a file note.



# OUTCOME

...the evidence of  
the **client** was **preferred**  
to that of the **solicitor**.



# Receipt and disbursement of trust money

S127 of the *Legal Profession Uniform Law* states:

***The objective of this Part is to ensure that trust money is held by law practices in a manner that protects the interests of the persons for whom or on whose behalf it is held.***





# Trust Account regulation

- *Re Somes* (1979) 32 ACTR53 at [70]: ‘Each partner has a responsibility for the safeguarding of the trust account. (s34 Uniform Law)
- *Re Mayes* [1974] 1 NSWLR 19 at [22], ‘complete indifference to the performance of his statutory obligations in relation to the trust account’ .
- *Council of the Law Society of New South Wales v Fay Marie Nicholls* [2012] NSWADT 222 concerned a solicitor who did not operate a trust account and deposited and inter-mixed trust monies in an office account (s146 Uniform Law)

# Undertakings

Rule 6 of the Legal Profession  
Uniform Law Australian Solicitors'  
Conduct Rules 2015



# Providing and managing undertakings

- Hawkins v Gaden (1925) 37 CLR 183 – undertaking by a clerk
- Keppie v Law Society of ACT (1983) – undertaking by an employed solicitor

## Suggestions for managing undertakings:

- manage undertaking the same way as any other deadline in a law practice such as, next in court date, exchange date, settlement date and statute of limitation date
- have a central register accessible by all principals and file handlers

# Supervision



# Solicitors' conduct rules

Rule 37 Solicitors' conduct rules states:

A solicitor with designated responsibility for a matter must exercise **reasonable** supervision over solicitors and all other employees engage in the provision of the legal services for that matter.

**Reasonable** is not defined!

# Kelly v Jowett [2009] NSWCA 278 (4 September 2009) per Her Honour McColl JA at paragraph 72

... ‘the employed solicitor was left in charge of the defense of the Equity Proceedings notwithstanding considerable material in [the principals] possession demonstrating... his unreliability in relation to matters he was given to handle



# Questions or comments



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