The Legal Services Commissioner
ADR in Complaints Handling

Jennifer Pakula
Manager, Complaints Resolution and Investigations
Legal Services Commissioner

Introduction: The Legal Services Commissioner and Complaints about Lawyers
Since late 2005 the Legal Services Commissioner has been the single gateway for complaints about legal practitioners. Since the inception of the office, it has received 11594 complaints, averaging about 2000 per year.

The LSC's purposes in handling complaints are set out in Chapter 4 of the *Legal Profession Act 2004* as follows:

4.1.1 Purposes

The purposes of this Chapter are—

(a) to provide a scheme for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of legal services and the public generally;
(b) to promote and enforce the professional standards, competence and honesty of the legal profession;
(c) to provide a means of redress for complaints about the legal profession.

The Act goes on to divide complaints into two categories, Civil and Disciplinary Complaints. Civil complaints are defined as follows:

4.2.2 Civil complaints and disputes

(1) A ***civil complaint*** is a complaint about conduct to which this Chapter applies, to the extent that the complaint involves a civil dispute.
(2) A ***civil dispute*** is any of the following—
  (a) a dispute (***costs dispute***) in relation to legal costs not exceeding $25 000 in respect of any one matter—
    (i) between a law practice or an Australian legal practitioner and a person who is charged with those costs or is liable to pay those costs (other than under a court or tribunal order for costs); or
    (ii) between a law practice or an Australian legal practitioner and a beneficiary under a will or trust in relation to which the law practice or practitioner has provided legal services in respect of which those costs are charged;
  (b) a claim that a person has suffered pecuniary losses as a result of an act or omission by a law practice or an Australian legal practitioner in the provision of legal services to the person, other than loss in respect of which a claim lies against the Fidelity Fund;
  (c) any other genuine dispute between a person and a law practice or an Australian legal practitioner arising out of, or in relation to, the provision of legal services to the person by the law practice or practitioner.
(3) A civil complaint may be made about the conduct of a law practice or an Australian legal practitioner.

From this, you can see that a civil dispute is generally one between a solicitor and client – the exception to the rule being beneficiaries to estates or trusts, who can also dispute costs. However, what about the many disputes that may involve a lawyer and fall outside these definitions?

Consider these examples:

- A city agent or expert witness chasing payment of costs from the practitioner who retained them;
- A lessee or mortgagor disputing the lessor's or mortgagee's legal costs;
- A dispute about costs where the total amount of legal fees exceeds $25,000;
- A dispute between former partners in a firm about ongoing display of the sign for the former firm.

The other category is the Disciplinary Complaint, defined as follows:

4.2.3 Disciplinary complaints

(1) A ***disciplinary complaint*** is a complaint about conduct to which this Chapter applies to the extent that the conduct, if established, would amount to unsatisfactory professional conduct or professional misconduct.

From this, it is evident that a disciplinary complaint needs to cross a threshold before it will be investigated: the conduct alleged would have to be something that, if proved, could amount to unsatisfactory professional conduct or professional misconduct. These are quite high standards. "Unsatisfactory professional conduct" is defined in s.4.4.2 of the Act as follows:

unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

This standard is beyond a mere mistake or oversight, and it is important to avoid the subjectivity into which this standard could so easily fall: it is the standard of a *reasonably* competent practitioner. While many complainants allege negligence, not all allegations will lead to an investigation, because not all negligence is a conduct issue. Particularly, it is not appropriate for the LSC to be providing a second opinion on what advice should have been given at the time, particularly given that we were not there at the time, we don't have all those facts at hand, and that many legal matters are inherently 'grey', meaning that there will be a range of possible advice that may be given rather than one definitive answer. This would not, of course, be the case with a demonstrable error that had a significant impact on the complaints. For example, a solicitor advised an executor client that the will was invalid rather than subject to challenge where the witnesses sign with two different pens. He advised her to administer the estate in accordance with the rules of intestacy rather than in accordance with testator's wishes, which resulted in family conflict, delay and a major costs blow-out to a very modest estate.

Examples of unsatisfactory professional conduct would include:

- Some instances of conflict of interest that do not have serious consequences for the parties involved;
- Misleading correspondence to an opposing practitioner;
- Failure to advise about the expiry of a limitation period;
- Significant and obvious negligence.

"Professional misconduct" is defined as follows:

For the purposes of this Act—

professional misconduct includes—

> (a)unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
> (b)conduct of an Australian legal practitioner, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

Note that it is an inclusive definition. The common law standards of misconduct continue to apply, particularly that the conduct would be of the kind viewed by peers as 'disgraceful and dishonourable'. Only a few very serious cases could fall into this category. Recent examples include:

- Taking executor's commission without obtaining appropriate consent of beneficiaries;
- Failure to pay moneys earmarked for barristers' fees;
- Trust defalcations;
- Dishonest and fraudulent activity.

Once a complaint is categorised as 'disciplinary', the aim is to investigate and to establish whether there is sufficient evidence to make it reasonably likely that the Victorian Civil and Administrative Tribunal ("VCAT") would find the practitioner guilty of unsatisfactory professional conduct or professional misconduct.

Needless to say, there are many complaints made that are about a practitioner's behaviour that could not amount to unsatisfactory professional conduct or professional misconduct. Take for example the following:

- a practitioner being abrupt or insensitive;
- a practitioner urging a client – often for good reasons - to accept a settlement that they don't like;
- a practitioner giving advice that seems to the client unclear or not really to the point;
- Delay and communication issues that are annoying but insufficient to amount to a disciplinary breach.

As such, there is a third, large category of complaint: the NOTAs (none of the above) which are not described by the Act in any significant way. The big question the Commissioner must deal with is, how do we handle complaints that do not strictly fit the categories set out in the Act?

One option is to summarily dismiss them, but that would result in well over half our complaints being dismissed without further action. This would be a failure in relation to the third aim of the Commissioner as set out in s.4.1.1 of the Act – which is to provide a means of redress for complaints about the legal profession.

Another option is to take a very generous view of what might constitute a disciplinary complaint and subject it to a full-blown investigation – but in the past that resulted in delays leading to an inevitable dismissal of the complaint, a situation with which neither complainant nor practitioner were happy.

A third option is to simply deal with such complaints in a way that will bring about the most satisfactory solution for the parties. This approach inevitably involves the use of ADR techniques, and very much brings to bear an ADR mindset. Where the issue is service related, an investigation will not resolve the matter in anyone's mind. A complainant generally does not care whether the Tribunal would be likely to find a practitioner guilty of a disciplinary breach. They do,

however, want to have their say, be understood and recognised, and in certain circumstances, receive some kind of redress, such as a payment – in many cases token – or an acknowledgement or apology from the practitioner. This has been the strategy behind the formation of our Rapid Resolution Team (RRT) some fifteen months ago.

The RRT is closely related to our existing Disputes Resolution Team (DRT) in that both are focussed on resolution rather than investigation. Whilst the DRT tends to concentrate on matters clearly falling within the parameters of a civil dispute under the Act, the aim of the RRT has been to deal creatively and effectively with those 'NOTA' complaints. The RRT aims to take general disputes, service-related complaints and matters that clearly indicate summary dismissal, and to deal with them as quickly and efficiently as possible – meaning that even in a matter where there is nothing that can be done by way of orders, disciplinary findings or referral to VCAT, some effort is made to resolve any presenting issue capable of resolution, or to give a personal explanation of why the complaint cannot be investigated. The work of the RRT and its use of ADR techniques will be described in more detail later in this paper.

Use of ADR in complaints – Legal Profession Act civil disputes

As set out above, the Act provides for the resolution of certain categories of civil dispute between solicitors and clients. These provisions mirror the pioneering provisions set out in the *Legal Practice Act 1996.* As such, the LSC and its predecessors have for some time been engaged in assisting parties to resolve disputes, particularly over costs.

It is a unique feature of the Victorian legislation that the costs dispute process can only go ahead if the complainant lodges with the LSC any outstanding costs (with provision for dispensation if lodgement would cause undue hardship). While this concept had been included, with modifications, in the draft national profession law (s.5.3.11), unfortunately it seems now to have been dropped. The way it works is that money is lodged in an interest-bearing account. If the dispute does not settle, the parties have the option of applying to VCAT for resolution and division of the moneys – if neither does this, the money is paid to the practitioner. If the complainant withdraws the complaint, the money is paid to the practitioner; if it settles, the money is divided according to the settlement agreement.

The beauty of this provision is that it provides a great incentive for parties to negotiate and settle. For the practitioner, the money is there and available without the need to sue the former client – it is in their interests to compromise for the sake of the 'bird in the hand'. For the client, a compromise is also attractive, as the alternatives involve either the risk and stress of going to VCAT or the whole amount being paid to the practitioner.

It is also important that, once the costs dispute has been lodged with the LSC, the practitioner may not sue the complainant for the costs (s.4.3.2), thus bringing them to the negotiating table with some force!

It is interesting that when complainants approach the LSC with a costs dispute, it is usually with a rights-based mindset. As such, we are asked to reduce or cancel a bill, or order that particular items be removed. The complainants' perception is that the LSC is like a Court, and that we can order the practitioner to amend his or her bill. Similarly, practitioners often come to the process suggesting that the bill be assessed to establish whether the work done on the file justifies the bill – again, an 'objective' rights-based approach where an umpire is called upon to make a binding decision about the dispute.

However, the reality is that most complainants are not really concerned with whether a costs assessor would agree with the bill – their issues are generally service related. It is not uncommon to receive a complaint that goes into great detail about the poor service and confusing advice

given, failures to return phone calls in a timely manner or at all, the practitioner's insensitivity and poor social skills etc – to summarise, "They did a bad job, I'm not happy and I'm not paying for it." It is very important at this stage to establish that the role of umpire is not our role. Our aim is to provide a fair process that will enable the parties to resolve the dispute themselves. If, after making fair attempts to resolve the dispute, we form the opinion that this cannot be done, the parties are given a letter setting out this decision and giving them the right to approach VCAT to make an application for resolution of the dispute within the next 60 days.
The Act gives the LSC broad power to resolve disputes:

4.3.5 Commissioner to attempt to resolve civil dispute

(1) The Commissioner must attempt to resolve a civil dispute that is the subject of a civil complaint and may take any action he or she considers necessary to assist the parties to reach agreement.
(2) Without limiting subsection (1), the Commissioner may—
  (a) refer a civil dispute for mediation under Division 3; or
  (b) in the case of a costs dispute—arrange for a non-binding assessment of legal costs.
(3) For the purposes of an assessment referred to in subsection (2)(b), the Commissioner may require the law practice or Australian legal practitioner concerned to provide any relevant documents or information.
(4) Evidence of anything said or done in the course of attempting to resolve a civil dispute is not admissible in proceedings before the Tribunal or any other proceedings relating to the subject-matter of the dispute.
(5) This section does not apply if—
  (a) the Commissioner has dismissed the complaint in respect of the dispute under section 4.2.10 or 4.3.3(3); or
  (b) the Commissioner considers that a civil dispute is unlikely to be resolved, or is not suitable for resolution by the Commissioner.

Our usual approach is one of telephone shuttle mediation. The complaint is summarised in writing to both parties – the complainant being asked to confirm if we have or have not understood their issues – and the process is explained. From there, our dispute resolution team members call both parties to get the negotiation under way.

The first telephone call is generally quite a long one, reflecting the issue exploration that needs to be undertaken. In many cases, it is important to talk through the presenting service issues, often as complainants will come to us demanding that disciplinary action be taken. However, the decision to undertake a disciplinary complaint investigation is the Commissioner's to make, not a right of the complainant. Nonetheless, it is vital to understand the complainant's issues and to talk them through. Also, it is important that we understand accurately what the complainant hopes to achieve by making the complaint. If the complainant wants something we can't provide, for example to reopen their case, it is important that they are given a more realistic understanding of what the complaint process can achieve as soon as possible. This call is also important in establishing rapport with the complainant and understanding of the LSC's role as a neutral third party seeking to resolve their matter.

By far the largest category of law from which complaints arise is Family Law. This area of law provides a consistent 20 – 25% of complaints each year, and complainants are generally suffering from the impact of the divorce and related matters. When they are unhappy with the legal process and with the result, there is a strong desire to obtain some kind of redress. As the LSC is a body to which people can bring their complaints, it is not uncommon to transfer much of the angst arising out of the personal circumstances – about which nothing can be done – to a practitioner whom the LSC can punish. It is therefore extremely important to unpack these issues and enable complainants to understand what the practitioner's role has been in the entire process.

Some complainants present with a very hardened, extreme position – typically that they should pay nothing at all, and that the practitioner should be struck off. In these circumstances, a conflict coaching approach has at times been adopted with some success.

When speaking to the practitioner in the first instance, there is often a fair bit of heat to endure on the part of the complaint handler. It is not uncommon for a practitioner to state that the complaint is utterly unjustified, that they 'busted their chops' for this ungrateful person, they are entitled to every cent and they will not negotiate. However, listening, exploring and time will often take the heat out of the practitioner's response. The DRT members work hard at establishing rapport with practitioners and helping them to see that our function is not to punish, but to help. Practitioners quickly see the merit in avoiding the cost and stress of VCAT and understand that our aim is not to advocate for the complainant, but to provide a neutral and mutually beneficial process.

The next stage is to discuss with the parties the types of options that are open to them, bearing in mind what the LSC can and cannot do with their complaint. There are many different approaches to obtaining information and explanations – for example the complaint handler reading the file or requesting specific responses from the practitioner to be given to the complainant – not a formal written explanation in response to a disciplinary investigation, but an explanation with a view to helping the complainant understand the circumstances and resolve the dispute. Sometimes a practitioner will send in a quite inflammatory letter. We don't pass these on as a general rule; however we will either summarise the essence of the explanation in a letter we write to the complainant, or we will ask the practitioner to do a judicious edit, bearing in mind the purpose of the letter.

An informal, non-binding costs assessment can be obtained by the LSC, although this is generally something we do only if both parties want an independent third party to make that judgment call. Even then, the parties are not bound by the assessment, but it often provides a good starting point for more focussed negotiation.

A lot of reality testing goes on, including discussing with the parties their best and worst alternatives to a negotiated outcome. Here, it is important to discuss what happens should the matter proceed to VCAT, especially from the complainant's point of view. Complainants need to understand that if they proceed to VCAT and the member does not significantly reduce the bill, they run the risk of having a costs order made against them – see for example *Larking v McDonald Murholme* (Legal Practice) [2010] VCAT 1122 (17 June 2010); conversely, practitioners can be ordered to pay the applicant complainants' costs – see for example *Leong v J P Sesto & Co & Ors* (Legal Practice) [2010] VCAT 367 (29 March 2010).

If no VCAT application is made by the complainant after the LSC decides that the matter cannot be settled by this office, the practitioner will simply need to wait another 60 days before the whole sum of money is paid to them, and the complainant pays the entire amount originally demanded. This possible outcome is an important factor that encourages compromise by the parties.

If settlement is reached, the final stage is for the LSC to prepare a settlement agreement reflecting the terms of agreement. While it is usually the case that the main term of the agreement is the division of moneys held on trust, other terms can be included, such as handing over client files, apologies and so on. The agreement can be certified and registered with the Magistrates Court should either party wish to enforce it.

In the end, the majority of disputes do settle within our office. Very few disputes are referred to formal mediation as it is generally only appropriate where the issues are complex and the money at stake is quite significant.

The DRT is keen to continue to think through the best means of dealing with complaints. We are particularly keen to increase the amount of face-to-face contact, and are beginning to develop ideas for in-office 'mini-mediations'.

The Rapid Resolution Team

The Rapid Resolution Team is an innovation of the LSC arising out of a review of our complaints handling process in early 2010, particularly the way we handle those troublesome complaints in the 'NOTA' category. A special characteristic of the team is its staff – all experienced, older practitioners armed with extensive knowledge, excellent people skills, authority and common sense.

The matters that are referred to the RRT are many and quite varied. For example,

- a dispute that may be technically outside the civil dispute function may look resolveable and as such, is given to the RRT for the attempt. Parties are told that the dispute is being treated informally – the consequence being that if the dispute is not able to be resolved, the parties cannot be referred to VCAT, and the complaint will be dismissed;
- Some matters have possible disciplinary aspects to them but include elements that can be resolved, for example where the dispute could be settled by a refund of fees. In this case, along with the resolution, the practitioner may, as part of the settlement, be given a warning or even a formal reprimand about the conduct issues that have taken place;
- Disputes between practitioners – covering issues of tactics in litigation, discourtesy and issues between former partners;
- Communication issues that could be resolved by an explanation or apology, including allegations of rude or insensitive behaviour;
- Ethical questions that could be resolved, such as possible conflicts of interest or delays in complying in undertakings;
- Allegations that could be serious, for example a failure to account, but could be cleared up by enquiries being made, for example the practitioner being contacted and asked to provide trust account statements. If the concerns are not allayed at this point, the complaint is passed on to the investigation team for a more formal treatment. However, if the concerns are satisfied, the complainant is often happy to withdraw the complaint;
- Complaints regarding settlements with which the complainant is unhappy, or allegations of poor advice where this is not really apparent on the face of the material. In such cases, some explanation is sought, but the complainant's expectations of the consequences of our enquiry must be managed very carefully. In most cases, the complaint will end up being dismissed, although the complainant will generally have some benefit from a better understanding of the outcome and assurance from an experienced person that what happened was not out of the normal range of outcomes.

It is important to note that no 'trade-off' is possible in relation to more serious disciplinary allegations. If the allegation fits the definition of a disciplinary complaint, it generally should be investigated. If the allegation is made out, appropriate disciplinary action must be taken in accordance with the Act.

Anecdotally, the RRT initiative shows a high level of satisfaction from both a complainant and practitioner point of view. Many matters that may have been either dismissed outright, or investigated and then dismissed, have been closed quickly and with a good outcome for both parties. A high level of satisfaction results from

- The matter being attacked quickly and some resolution reached (be it a payment of money, or an explanation, or resolution of the presenting problem, such as a file being handed over);

- The telephone or email being the primary means of communication, keeping formal correspondence to a minimum;

- The file being reviewed and assessed quickly by an experienced practitioner often gives an independent insight to a complainant;

- Practitioners having confidence in the experience and understanding of the team.

Many of the techniques of the RRT are similar to those employed by the Dispute Resolution Team. Exploration of the parties' issues is an important first step, as is enabling the parties to understand what the LSC can and cannot do in dealing with complaints. Again, a process of shuttle mediation is common, and sometimes face-to-face mediations can take place in either a full-blown or 'lite' version. Further, the RRT officers commonly meet with parties to discuss the issues and manage complainant expectations, meet with practitioners in their offices and review the files in question, and/or obtain some explanation to assist the complainant. A common outcome is for the complaint to be withdrawn on the basis of a settlement reached between the parties.

In many ways, the use of ADR techniques is the only appropriate way to deal with many complaints. People who make complaints are usually quite aggrieved, sometimes seriously so. If their complaint is not going to establish a disciplinary breach, it is insulting to them to simply dismiss it or subject it to an investigation that will inevitably result in a dismissal. The message that is sent by that process is that their concerns are minor and they are wrong to be upset. However, a process that enables them to be heard, to get across their disgruntlement and for that to be acknowledged, will go a long way in dealing with their concerns.

The LSC takes seriously its mission to deal with complaints about lawyers in a targeted, appropriate way. The use of ADR is an essential tool in our kit and enables us to fulfil our mission.