

# *Professional Standards Committee:* provides a review by your peers

*By John Goldberg, Chair, Professional Standards Committee*

The Professional Standards Committee is a committee of the Law Society which has a number of very significant delegations from the Council of the Society. None of these delegations take away the right of the Council to deal with these matters itself, but they include the following:

- to make recommendations to Council on the requirements for professional conduct and ethical standards for members of the legal profession practising in South Australia;
- to represent the Society and to report to Council on a wide range of statutory matters entrusted to the Society under the *Legal Practitioners Act*;
- to investigate the circumstances and give advice in relation to the appointment of a supervisor or manager to a legal practice;
- to deal with claims under the Guarantee Fund;
- to prepare information for the guidance of the profession relating to trust accounts, the appointment of inspectors and matters of discipline and professional conduct; and
- to receive and consider complaints regarding the conduct of legal practitioners made to the Society or Council and determine whether the Society has reasonable grounds to suspect that a legal practitioner has been guilty of unprofessional or unsatisfactory conduct and if so satisfied, either to report the matter to the Conduct Board or direct the Conduct Board to make an investigation.

The Professional Standards Committee meets monthly and staff members of the Professional Standards Section of the Society attend these meetings. The question may well be asked, as it sometimes is, what is the Law Society doing assuming a regulatory role when it is a membership organisation?

There are two answers to that. First and foremost, it is discharging functions that have been assigned to it by the *Legal Practitioners Act*. In carrying out its statutory duties, the Society is complying with both the Act and its own charter. This raises a philosophical question which is, should the legal profession or any other profession for that matter be self-regulating? There was a time when the legal profession was almost entirely self-regulating as it was responsible for disciplining practitioners, a function that is now in the hands of the Legal Practitioners Conduct Board and the Disciplinary Tribunal, both of which bodies are independent of the Society. The South Australian Supreme Court has and always has had the ultimate power to admit and strike off practitioners. When it comes to the setting and maintenance of ethical standards, the Society does and, in my opinion, should have a leading role.

This role has, in part, been delegated by the Council of the Society to a combination of the Professional Standards Section of the Society and the Professional Standards Committee. Why both? It is very important that South Australian practitioners are aware that in significant matters that affect the manner in which they practise law, a peer review procedure is in place. Even though the Professional Standards Section of the Society has on its staff a number of lawyers, including its Director Ros Burke, when it comes to dealing with practitioners who are not maintaining their practice or their trust account in accordance with their ethical and statutory obligations, they need to know that the vital decisions of the Professional Standards Section have been scrutinised and endorsed by a review committee of their peers.

And so who are the members of the Professional Standards Committee?

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I am the current Chair and my appointment as Chair was made by the Council of the Society. I have had 40 years experience as a practitioner, 27 years of which I was involved conducting a small practice. I have also participated in the management of the Professional Indemnity Fund for many years and I have served on the Council of the Society and every position on the Executive, including President. There are currently four other former Presidents of the Society serving on this Committee one of whom, Alex Ward, is also a former Law Council of Australia President. In addition, we have the current Vice President of the Society as a Committee member and a number of other experienced practitioners. As far as a peer group is concerned, I believe that the profession can be confident that the members of the Professional Standards Committee have the necessary experience and background to make the judgments that the Council expects of them.

As for the question of tension between the role of membership organisation and the Society's regulatory role, I would put to you the question: who would you rather have doing it? If it is not practising members of the profession who have experienced all

the stresses and pressures of practice, then should it be public servants? The message I want to convey is that if we are not prepared to regulate ourselves and to carry out the task competently and fearlessly, there will be no shortage of volunteers willing to do it for us.

It is of course trite to say that one of the hallmarks of a profession, any profession, is self regulation. The Conduct Rules which govern the manner in which we are to carry out our role as legal practitioners and officers of the Court are those which have been accepted by the Society. Due to the efforts of the Law Council of Australia, they should eventually be largely uniform throughout Australia, but they have been voluntarily adopted by our Society and they contain or omit certain provisions as a consequence of decisions made by our Society.

It is our Society that has a statutory duty to make a report to the Conduct Board where it decides there are reasonable grounds to suspect unprofessional or unsatisfactory conduct and it is largely the role of the Professional Standards Committee to make that determination. It is not always a

pleasant task but it is an obligation imposed on the Society by law and there is a public expectation that when a complaint is made to the Society it will be properly considered and, if appropriate, passed on to the investigating authority.

As Chair of the Professional Standards Committee it is occasionally my role, in conjunction with the Director of the Professional Standards Section, to visit practitioners to provide counsel on the importance of dealing with an outstanding issue, such as failure to keep their trust account in accordance with the regulations or failure to conduct properly their practice. We can and do point out the help that is available to them, for example from the members of the Lawyers Support Group or from the counselling service provided by Dr Jill.

Currently, the Executive is reviewing the composition of the Professional Standards Committee. It is an important committee and it needs to have members who have considerable practical experience and knowledge of how the system works, but it also needs to continue to be properly representative of the profession. **B**

## A Question of Ethics

# A Question of Ethics: Retainer Agreements

*A regular column in which de-identified decisions and rulings of the Professional Standards Committee are briefly reported and discussed.*

A practitioner sought advice on the inclusion of the following provisions in a retainer agreement:

1. A \$30 fee for each trust account attendance or transaction.
2. The imposition of 15 percent interest plus a monthly fee on outstanding accounts.
3. A 10 percent disbursement administration fee.

The Committee decided that the provisions exposed the practitioner to risk on the following grounds:

- A legal practitioner is unable to profit out of the fiduciary relationship other than via reasonable fees for the provision of legal services. As the charges do not constitute fees for legal services, in order for the practitioner to be entitled to charge those fees he/she

must seek a waiver from or agreement by the client to do so.

- That waiver or agreement is only valid when it is provided after full disclosure has occurred. If 'A' owes a fiduciary duty to 'B' and A wants to get B to agree to absolve A from having to observe that duty, A must provide B with the full details of the fiduciary duty owed and thus inform B of what B is sacrificing so that B can provide informed consent to the duty being absolved.

- Even if the requirement of informed consent is satisfied, the clauses may still be struck down by the Court as being unreasonable. For example, the practitioner would need to prove that the interest and the monthly fee charges fairly compensated him or her for losses incurred as a consequence of the outstanding debt to be considered reasonable.

- There is a presumption that when a statutory duty is placed on a party, that party can't charge for the discharge of that duty unless such a charge is set out in the statute itself. As there is no charge referred to in the Act with respect to attending to trust accounting obligations, any ability to charge for complying with those obligations is precluded.

*This column aims to provide the profession with insight into the role and function of the Professional Standards Committee and information on real life ethical and conduct issues that are faced by legal practitioners in South Australia every day. Any member of the profession who would like the Professional Standards business unit to consider and provide advice on an ethical or conduct issue can call or email Professional Standards on 8229 0229, profstds@lawsocietysa.asn.au. In appropriate cases enquiries will be referred to the Committee. **B***