

# Opposing Representatives



## What is acceptable behaviour by lawyers on the opposing side?

This fact sheet provides information for Complainants about what is acceptable conduct by lawyers on the opposing side.

### Introduction

The role of legal representatives is to protect their own clients' interests, within the boundaries of professional conduct rules and standards. They advise their own clients on the best course of action and act on their own clients' instructions.

A lawyer for one side has no responsibility for the interests of other parties. On the contrary, our *adversarial system of justice* (where disputes often produce a winner and a loser) means that:

- your lawyer can be expected to say or do things which go against the interests of other parties, and
- other parties' legal representatives can be expected to say or do things which go against your interests.

You cannot interfere in the professional relationship between another party and their legal representative, even if you disagree with:

- the advice that the opposing legal representative is giving the other party, or
- the instructions that the other party is giving their legal representative.

On occasion you might believe that the opposing legal representative is not carrying out the other party's instructions. For example, the legal representative might reject an informal agreement that you believe you have reached with the other party. This might be because the other party's legal representative has advised them that the agreement is not in their best interests, and they have therefore instructed the legal representative to reject the agreement. You ought only complain about an opposing legal representative's course of action if you have a reasonably held belief supported by some evidence that they are not acting on instructions, or are acting on instructions that they know are untrue or unethical.

The lawyer for the opposing party might say something or state a fact that you disagree with. The lawyer may have made that comment on the basis of his or her client's instructions. You should take this into account before complaining or suggesting that the opposing lawyer has done something wrong.

### Communicating with the other side's legal representative

The *Legal Profession (Solicitor's Conduct) Rules 2020* (the Rules)<sup>1</sup>, Rule 38, provides that a lawyer must not deal (communicate) directly with the client(s) of another lawyer unless:

- (a) the other lawyer has previously consented; or
- (b) the lawyer believes on reasonable grounds that:

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<sup>1</sup> Commenced 1 October 2020.

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- (i) the circumstances are so urgent as to require the solicitor to do so; and
- (ii) the dealing would not be unfair to the opponent's client; or
- (c) the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented, and if so, by whom; or
- (d) there is notice of the lawyer's intention to communicate with the other party or parties, but the other lawyer has failed, after reasonable time, to reply and there is a reasonable basis for proceeding with contact; or
- (e) The lawyer is asked to provide a second opinion by the client or clients of the other lawyer.

## Unrepresented litigants

Lawyers must exercise great care when communicating with unrepresented parties. They must avoid any suggestion of undue influence, duress or the use of unfair advantage. If the opposing legal representative is reluctant to communicate directly with an unrepresented party, this may be for the unrepresented party's own protection – and not necessarily a sign of discourtesy.

## Behaviour in court

You might consider that the opposing legal representative's behaviour in court is aggressive or rude. During cross-examination, when the other party's legal representative is challenging your evidence, the questioning might be particularly direct and forceful. This is not necessarily inappropriate – in fact it may be required in order to protect the interests of the legal representative's client.

A lawyer's conduct in court is under the control of the judge. Your own legal representative can object if the opposing legal representative's language seems unnecessarily offensive or intimidating, or if their behaviour could interfere with the process of justice. The judge will decide if the language and behaviour are acceptable.

Similarly, there is nothing improper in a legal representative filing documents and presenting evidence in a way that presents their client's case in the best possible light. If you disagree with the facts presented on behalf of your opponent, it is up to you to put different evidence to the court. The judge will then decide which evidence is preferred.

Sometimes settlement negotiations begin or continue at court. Lawyers can advise their clients about settlement, but the decision rests with the client. If the opposing legal representative's attitude to settlement appears to be 'hard' or their demands are high, they may simply be acting on their client's instructions.

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## Opposing lawyer's duties before the court

In Tasmania, either a solicitor may be engaged for court appearances or a barrister. Solicitors are required to comply with the Rules and similarly, barristers are required to comply with the *Legal Profession (Barristers) Rules 2016* ('the Barristers Rules'). The Rules and Barristers Rules govern a lawyer's conduct before the court and require frankness in court at all times. Both the Rules<sup>2</sup> and Barrister's Rules<sup>3</sup> include principles that a lawyer:

- (1) Must not deceive or knowingly or recklessly mislead the court
- (2) Must take all necessary steps to correct any misleading statement made by the lawyer to a court as soon as possible after the lawyer becomes aware that the statement was misleading
- (3) A lawyer will not have made a misleading statement to the court by failing to correct an error in a statement made to the court by the opponent or any other person.

## Complaints about opposing legal representatives

You should consider the above information before you consider a complaint about another party's lawyer or barrister.

If you reasonably believe a lawyer or barrister has misled a court or tribunal, it is important to contact the Legal Profession Board.

The Board is unable to interfere in legal proceedings before a court or tribunal where a complaint is made about opposing legal representative. If you are represented, we recommend you discuss your concerns with your own lawyer before you make a complaint, as they may be able to explain why the conduct has occurred or the context in which it has occurred.

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<sup>2</sup> Rule 24

<sup>3</sup> The Barrister's Rules adopt the Legal Profession Uniform Conduct (Barristers) Rules 2015 – refer Rules 24 - 25

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## Case Study 1

The Board received a complaint from a respondent to an application in the Magistrates Court for a family violence order (FVO). The application for the FVO was made by the Complainant's ex-partner's lawyer. The initial application did not succeed. A further application was made, but in the interim (and before the defended hearing) the ex-partner's lawyer made an application for an order on an ex-parte basis (i.e. without having to notify the Complainant). The Magistrates Court advised the ex-partner's lawyer that the Magistrate would not deal with the matter ex-parte and that service on the Complainant would be required. The Complainant's allegations of complaint to the Board were that the ex-partner's lawyer deliberately caused the Complainant to incur significant legal costs including defending 'frivolous' applications for an FVO. The complaint was dismissed by the Board, with the Board noting that parties to proceedings are entitled to file ex-parte applications having regard to the circumstances of a particular matter. Not giving notice to a party in some circumstances is not considered a denial of procedural fairness or natural justice, as the overall interests of justice may require a Court to act on an ex-parte basis.

The Board noted that issues arising from the multiple FVO applications were more appropriately dealt with by the Magistrate's Court, including in relation to the Complainant making an application for legal costs.

## Case Study 2

The Complainant was a self-represented applicant in a family law case seeking access to a grandchild. The father of the child was also self-represented. The mother of the child was represented by a lawyer. The Complainant believed the lawyer, at a conference convened by the independent children's lawyer (ICL), was biased. The Complainant believed that bias was demonstrated because the mother of the child had exaggerated her life story to include abuse by the Complainant and represented that the Complainant was a threat to the grandchild. The Complainant believed that the mother's lawyer's conduct at the conference amounted to emotional blackmail.

The complaint was dismissed. The Board noted that parties may adopt varying positions which can be challenging for other parties in family law proceedings. The mediation referred to was conducted by the relevant ICL. It is normal in a mediation the parties may agree on some matters and be opposed on others.

*The information contained in this fact sheet does not constitute legal advice.*

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## Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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