ETHICAL ISSUES IN CORRESPONDENCE BETWEEN SOLICITORS

Address to FNQLA 9 March 2012 Cairns
By The Honourable Justice Henry

Good afternoon. In proposing the topic on which I will now address you I emailed this to your President:

> *"How about 'Ethical issues in correspondence between solicitors?' Would that suit? Such a topic might give me an opportunity to highlight that correspondence driven by a solicitor's ego and or living up to the mantra of "aggressive litigation" rather than the client's interests, is inappropriate. I get to see a lot of such correspondence exhibited to affidavits for chamber applications."*

The topic, "Ethical Issues in correspondence between solicitors", is a topic which I expect is easier for a judge to address than for a barrister such as Mr Philp SC, the previous speaker. As fiercely independent as barristers are, they nonetheless find it hard to criticise the conduct of those to whom they look for work.

Barristers you see, speak in code. Barristers do not always mean what they say. You all know when they say to a judge 'with respect' they do not really mean it. But they do it to you too, not just to me. A solicitor asking the barrister he or she has briefed what counsel thought of the forceful letter sent by the instructing solicitor to the opposing solicitor might get the response, "It was good" or "It was okay". When that happens, I can tell you that is barristers' code and the barrister does not really mean it was a good letter or that it was okay to send it. What the barrister really means to say is, "I thought it was a self indulgent diatribe which was counterproductive and will make our side look bad on this loser of an application you briefed me in for tomorrow". So you see it's better this comes from me than counsel.

As a judge I not only feel less constrained than most counsel may if asked to address this topic. I can also confirm for you that which I suppose I always believed as an advocate: when ego driven, aggressive correspondence sees the light of day in court, it is an irritating distraction from a proper understanding of the merit of its author's client's cause.

As a judge on applications mornings or days, my pre-court diet is coffee and a smorgasbord of solicitor to solicitor correspondence exhibited to affidavits of opposing solicitors. Much of what I see, indeed the majority of solicitor to solicitor correspondence, is professional and courteous. But some of it, albeit the minority, is neither. When I say minority, it is a minority of some substance.

My impression in that regard may be distorted a little in this sense. Imagine if you will that in the life of a matter leading up to your chamber application tomorrow, you have written say 15 letters to your opponent. In 14 of them you were tolerant, courteous and professional. In one of them though, let us say the ninth letter you wrote, you slipped. You might have been upset or angry, hung-over or overwhelmed by the righteousness of your cause or your opponent's refusal to concede it. You might have been worried you had not done much on the case lately and therefore

thought you better accuse your opponent of not doing much on the case lately. Whatever the reason, in letter No. 9, you slipped. You let the adjectives flow, you accused, you criticised, you spewed forth venom. Basically, you wrote a letter, letter No.9, driven by your ego or your intolerance in the heat of the moment, rather than your client's best interests. So, coming back to my distorted impression, which letters of the 15 you have sent will your opponent annex to his affidavit for the chamber application before me tomorrow? Do you really have any doubt that, even if completely irrelevant to the chamber application, tomorrow, amongst the exhibits, possibly in duplicate, will be letter No.9. It is against this background that when your President came a-calling I suggested I ought speak on the topic of Ethical issues in correspondence between solicitors.

The starting point in this context is to ask what does "ethical" actually mean? The authors of Professional Responsibility and Legal Ethics in Queensland, Corones Stobbs & Thomas, suggest (at pages 2 & 3) there has been a reconceptionalisation of ethics:

> *"For many years professional ethics, or professional rules of conduct, were essentially rules based on moral principles. Ethical rules were seen as being synonymous with moral principles. However, moral principles alone are no longer the sole basis for regulating contemporary legal practice in Queensland.*
>
> *The current regulatory regime establishes a set of legal conduct rules that are more concerned with establishing and preserving the integrity of the legal services market and the confidence of consumers in the quality of services and products within that market than they are with "doing the right thing" in a purely moral sense.*
>
> *The traditional distinction between law as a business and law as a profession no longer applies. The current regulatory regime relies on competition as a process of rivalry and free market forces to provide access to legal services of the highest quality and at the lowest price. The notion of unethical or unsatisfactory professional conduct has been reconceptualised. It is no longer judged in terms of what lawyers are entitled to expect of each other with regards to meeting professional standards. Instead, it is assessed in terms of what members of the public, as consumers of legal services are entitled to expect of a reasonably competent Australian legal practitioner."*

This aspect of their commentary troubles me. It appears to be vulnerable to an interpretation that there has been a narrowing of the professional ethical field. However, the authors go on to explain that, in effect, the field has actually broadened:

> *"Furthermore, the Legal Services Commission expressly states that some and perhaps the majority of the conduct that it seeks to combat and eradicate: "…goes beyond unethical or improper conduct to include, depending on the circumstances, the sorts of honest mistakes, errors of judgment and poor standards of client service that give rise to legitimate consumer grievance."*

> *There is a sense, then, in which practitioners need to ask themselves two related questions:*
>
> *First, what does it mean to act ethically and why should I act in those ways?*
>
> *Secondly, what constitutes good client service and why should I provide such service?"*

Those questions are not inextricably connected. There is no mystery as to why you should provide good client service. It is at once morally or ethically right to do so, as well as your implied contractual obligation to your client to do so. After all, who hires a solicitor to provide bad service? Nor is there any mystery conceptually as to what constitutes good client service. Surely it must be service which is in the best interests of the client. As to why you should act ethically, the answer is that it is both in the best interest of the client and your own professional reputation. Moreover, the preservation of your professional reputation is itself in the best interests of your current and future clients. Ultimately, the best assurance of ethical conduct is to pursue the best interests of your client and to do so in a manner which preserves your professional reputation. This you should do by reference to the ethical principles which have long underpinned our profession. That is, you should not limit yourself merely to ensuring you are obeying the latest written rules of your organisation.

That said, it is useful in considering "Ethical issues in correspondence between solicitors" to refer to the relevant legislative provisions and rules. An extract is before you so I shall not dwell long on this.

The *Legal Profession Act* 2007 provides at s 219 for your Law Society to make rules about legal practice in your jurisdiction. Section 227 provides that failure to comply with your Legal Profession Rules is capable of constituting unsatisfactory professional conduct or professional misconduct.

Then, to the Rules themselves. Are there any that might relate to correspondence? They appear to be those that I have included in the extracts before you.

Generally speaking, the Objects appear to be relevant to how you might discharge your obligations in drafting and sending correspondence. Likewise, the preamble under "Serving the interests of justice and complying with the law" seems to be generally relevant.

Rule 3 – Confidentiality, is inevitably relevant to what you do or do not disclose in correspondence.

Rule 18 deals specifically with communications with your opponent. It does so rather briefly and bluntly, providing against making false statements to your opponent and providing that you take all necessary steps to correct any false statements but not doing much more than that. However, under a later area in the Rules headed "Relations with other practitioners", you will see the statement of general principle requires you to act honestly, fairly and courteously and adhere faithfully to your

undertakings, in order to transact lawfully and competently the business you undertake for your clients.

At Rule 21 – Communications, note the specific requirement that you ensure your communications are courteous and you avoid offensive or provocative language or conduct.

Undertakings are dealt with at 22, which must be complied with in written correspondence if undertakings are given therein.

Under the heading "Relations with third parties", "Communications" again appears at Rule 28. Notwithstanding that it appears under that heading, it seems to me that rule falls to be read as if it also applies to communications as between solicitors, for the rule provides you must not in connection with the practice of law, in any communication with another person do any of the matters following. Surely "another person" must include your opponent.

There is a generic high standard of conduct set out in Rule 30. Plainly that would apply to your conduct of correspondence.

I have included Rule 37 - Supervision, to remind the managing partners here that you may well find yourself in difficulty if you fail to adequately oversee the standard of correspondence that is being sent out by those whom you supervise.

So much for the Rules.

In preparing for today I have endeavoured to isolate the sort of questions you might ask about the appropriateness of the correspondence you send. It seems to me that in this specific context of correspondence between solicitors you may find it useful before sending correspondence to ask yourself six simple questions which should, in combination, ensure ethical conduct by you in corresponding with your opponent.

1. Is it necessary?
2. Is it articulate?
3. Is it courteous?
4. Is it accurate?
5. Does it respect the solicitor/client relationship?
6. Is it clearly within the law?

Of these, it is no. 3 in particular upon which I will dwell the longest today. First though to No. 1.

<u>Question 1 - Is it necessary</u>?
Some correspondence serves no material purpose or so little purpose that it is not a necessary use of client resources. Sending unnecessary correspondence to your opponent is unethical for several reasons, the most obvious two of which are as follows.

Firstly, it is an abuse of your client's trust, a breach of the fiduciary duty of loyalty. Over-servicing, that is carrying out more work than is necessary in acting for a client,

amounts to a breach of loyalty because the solicitor is advancing his or her interests at the expense of the client. In *Hayley v* The *Law Society of New South Wales*, Unreported, NSW, 6 October 1995, Justice of Appeal Mahoney said, when explaining the nature of the breach I have just described, that clients:

> *"... ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable; they ordinarily assume that the solicitor will make only such charges.*
>
> *Solicitors are, on the other hand, informed, or in a position to inform themselves of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage."*

To remove doubt I can assure you that in this State there have been findings of professional misconduct where a solicitor took advantage of a client by overcharging, for example in *Legal Services Commissioner v Towers* [2006] LPT 3.

The second way in which unnecessary correspondence is unethical is that it unfairly activates the professional obligation your opponent has to give proper consideration to the correspondence, including how, if at all, it ought be responded to. It may unnecessarily provoke a response from your opponent who assumes your correspondence must have been intended to serve some purpose but seeks clarification of what that purpose is. Thus, a cycle of correspondence and consequent incurring of client costs on both sides may occur. Where does it begin? With a letter which should not have been sent in the first place because it was unnecessary.

I digress to note that in the U.K. in the equivalent of your rules their rule 19(3) requires practitioners to acknowledge the receipt of a letter from another practitioner as a matter of courtesy and their Rule 12(10) provides a practitioner should deal promptly with communications relating to the matter of a client or former client. I cannot find a precisely equivalent rule in your rules and perhaps it's for the best for, as courteous as you all may be, there should hardly be an expectation on you to respond to correspondence which has been sent to you unnecessarily. The reality though is you may properly respond out of courtesy and thus cost your client money too; all because your opponent sent the unnecessary correspondence unethically in the first place.

Sending unnecessary correspondence is not directly addressed by your rules but at the very least it would be caught by Rule 30's general provision about your standards of conduct.

<u>Question Two – Is it articulate</u>?
Does the correspondence clearly communicate its purpose? If not, then it is a waste of client resources and it may, in the manner I have just described result in a further cycle of unnecessary correspondence seeking clarification. That is, it has the potential to also be a waste of your opponent's time and resources. Further, it will be a dent on your reputation.

Sending an incoherent or vague letter, a letter which does not clearly communicate its purpose, is in my view unethical not only for the reasons mentioned when I discussed the sending of unnecessary correspondence. The relationship of trust between solicitor and client assumes the solicitor will pursue the client's interests competently. Sending inarticulate correspondence is incompetent and thus a breach of trust.

Question 3 – Is the correspondence courteous?
As I have already reminded you, Rule 21 puts a positive obligation upon you to be courteous. Sending correspondence which is discourteous or uses offensive or provocative language may constitute unsatisfactory professional conduct or professional misconduct. The LSC's latest annual report records that findings of unsatisfactory professional conduct have been made in respect of offensive correspondence.

What might be offensive? The following example does not relate directly to solicitor to solicitor correspondence but it was most certainly written by a solicitor. It was a complaint in the Northern Territory. A practitioner was found guilty of unprofessional conduct which included writing to the client in derogatory and offensive terms:

> *"Do not call me as your call would most certainly not be welcome…you are the most paranoid, pathetic client I have ever encountered…I suggest you get a life, as I now understand why the offender in your matter would have felt compelled to slot you…I otherwise confirm the settlement amount exceeded your expectations for which you have expressed all the gratitude of a mangy dog with a heart the size of a split pea with a grub on it."*

That provoked a fine of $770, perhaps generously.

Closer to home, in *Legal Services Commissioner v Murrell* No. 7 of 2005, the issue and the language used therein amounted to unsatisfactory professional conduct resulting in a $2,000 fine. The letter was forwarded to a doctor by the solicitor, who had been retained by the husband and the daughters of the late Gladys Knight. The letter said:

> *"As you will remember I acted for Gladys Knight who unfortunately died on 28 May 2003. Her husband and daughters happened to note that your mother also passed away last week. At their request they have asked me to write to you and to remind you of what you did to their mother and to tell you of the pain, suffering and problems that she experienced as a result of the incompetent manner in which you treated their mother when she was alive.*
>
> *Although my clients are not privy to the circumstances in which your mother died, they hope that she experienced the same hurt, harm and detriment before she died, or if not, that you experienced suffering of the likes that their mother suffered and the pain and anguish that they went through as a consequence thereof."*

The solicitor did not even have instructions from the clients to write the letter. The calculation of the fine took into account the fact that the solicitor had gone bankrupt.

More recently in Queensland a solicitor, Mr Cooper, encountered difficulty as reported in *Legal Services Commissioner v Cooper* [2011] QCAT 209. He used language in two letters to another solicitor which was discourteous, offensive or provocative in breach of Rule 21. The initial letter is relatively mild so I will not dwell on it. In the next letter Mr Cooper said:

> *"I have advised my client to instruct me not to respond to anymore of your correspondence. It just seems to me that everytime you have got no work to do you return to the wife's file because there is plenty of money there to pay your legal fees...*
>
> *The children's issues are never going to be resolved at the mediation. The likelihood is that your client and her family have done so much damage to the child that my client will never have a meaningful relationship with his daughter. Your client will live to regret that in the future when your child grows up and becomes as dysfunctional as your client is."*

Some of the findings include these propositions in respect of Rule 21:

> *"Read together, it can be seen that unsatisfactory professional conduct can be constituted at one end of the scale by offensive, gratuitous and unjustified remarks and at the end by the relatively minor 'discourtesy'".*

The Commissioner accepted the conduct evinced in the letters should only be categorised as the lesser charge under s 418, that is, unsatisfactory professional conduct.

Cooper's case referred to what it described as being the only other case involving the use of offensive language in communications to which the parties could refer to the Tribunal, namely *Legal Services Commissioner v Winning* [2008] LPT 13. I would go to some of that case and read some of it to you if we were not at lunch and in mixed company. Perhaps the more sanitary description of Mr Winning's language given in Mr Cooper's case will suffice:

> *"On several occasions he used grossly offensive and obscene language in court and in conversation with other legal practitioners and officials with reference to fellow practitioners and high public legal officials."*

Returning to Cooper's case, the Tribunal found on any view the language used in the letters was intemperate, inappropriate and discourteous and in some respects offensive, although it also said that it paled by comparison to what was said in *Winning.* The Tribunal observed:

> *"...the risk that lawyers might communicate with each other in offensive or inappropriately discourteous terms is a real one, as the existence of Rule 21 acknowledges. That said, the rule does speak for itself and acts as a constant restraint upon lawyers.*
>
> *...Mr Cooper's language is intemperate and disappointing but it is difficult to see how public reprimand of him could have any effect of general deterrence. All lawyers ought be familiar with the rule already."*

A finding of unsatisfactory professional conduct and an order that Mr Cooper pay the Commissioner's costs of $2,500 was made.

Quite apart from the Rules providing that you should be courteous, there is in any event good reason to be so. Civility in conduct is a mark of professionalism. Absence of it brings your professional reputations into disrepute.

There is some useful commentary on civility and professionalism appearing in Issue 34 of *Without Prejudice* a publication of the Office of the Legal Services Commission of New South Wales, some of which I will share with you now.

> *"The importance of maintaining civility amongst practitioners is undeniable. Cordial and courteous communications promote a good working environment to adjudicate disputes without tension and distress. According to Nagorney, civility within the legal system:*
>
> > *"not only holds the profession together but also contributes to the continuation of a just society. Conduct that may be characterised as uncivil, abrasive, hostile or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully and efficiently, in turn delaying or even denying justice."*
>
> *A lack of civility diminishes public regard and may in turn reduce confidence in the judicial system.*
>
> *The need for courteous communications has been recognised on numerous occasions by the courts, regulators and academics, both in Australia and overseas. According to Chief Justice Speigleman, civility is recognised as a fundamental ethical obligation of a professional person. Similarly, in Garrard v Email Furniture Propriety Limited Kirby ACJ remarked:*
>
> > *"Those members of the legal profession who seek to win a momentary advantage for their clients without observing the proper courtesies invite correction by the court and disapproval of their colleagues. To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community."*

In the United State where the necessity for civility has been a major topic of concern for the past 40 years, a former president of the American Bar Association recently commented:

> *"A deterioration of civility interrupts the administration of justice. It makes the practice of law less rewarding. It robs a lawyer of the sense of dignity and self-worth that should come from a learned profession. Not least of all, it brings with it all the problems that accompany low public regard for lawyers and lack of confidence in the justice system."*

Despite the obvious benefits of civility to the legal profession, many avow that civility is anachronistic or incompatible with today's commercial realities. According to this view law is a deemed 'business' and calls for ruthless competitiveness. The 'law as a business' advocates believe that the only effective method available to a practitioner to succeed is to become a Rambo lawyer who operates without conviction or conscience.

Civility is however not inconsistent with representing a client diligently within the rules and nor it is a sign of weakness:

> *"A lawyer can be firm and tough minded while being unfailingly courteous. Indeed, there is real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully who do not deserve respect and from refusing to respond in kind to personal insult."*

Without civility there can be no professionalism. As Chief Justice Robert Benham of the Supreme Court of Georgia in Butts v The State 546 SE 206 272 (6a.2001) commented:

> *"…civility, which incorporates respect, courtesy, politeness, graciousness and basic good manners is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.""*

I note that in New Zealand there exists this rule:

> *"Practitioners should not communicate or correspond in an atmosphere of acrimony or discourtesy notwithstanding the nature of the relationship between the respective clients."*

To that, I would add, especially because of the relationship between their clients. "Especially" because it is entirely possible that relationship between clients will be discourteous and will be acrimonious. It is therefore all the more important that we behave with civility and courtesy. The comments earlier made about the real power to be found in behaving in that way hit home when you are in a case where the

parties, that is to say the clients, are not civil to each other. Such cases, when you have them, underscore the importance of you maintaining the highest of standards when it comes to behaving in a civil manner towards your opponent.

I mentioned earlier what happens when correspondence sees "the light of day" in court. That language picks up on an old test that many employers use in explaining to staff the importance, when they are dealing with documents, correspondence and file notes, of remembering it may see the light of day. Paul Monaghan, Senior Ethics Solicitor, in an article in the Law Society Journal 47(2) March 2009:37 "Conflicts and Communication" relevantly observed:

> *"Practitioners spend the bulk of their time communicating with the court with clients and with other members of the legal profession and often in situations where they are dealing with highly complex matters under extreme pressures of time and accountability. Nevertheless, the standard of communication required of practitioners is high. Professional courtesy must be maintained in both oral and written communications, though the large number of enquiries made with the Ethics Department in 2008 on this issue show there is an undesirable trend for standards to slip.*
>
> *A subjective test that may help understand what is required is succinctly described in terms of the advice often given by senior practitioners to new members of the profession when they first commence the honourable practice of la: 'Don't say anything you don't want repeated to world and don't write anything you would not want read out in open court'.*
>
> *Applying this simple practical test should help eliminate impolite, offensive, threatening, abusive and insulting comments that always reflect poorly upon their author."*

I agree with that advice.

<u>Question 4 – Is it accurate</u>?
Is the content of the correspondence accurate? Rules 18 and 28 would appear to apply to this assessment.

It is important to be accurate in respect of objectively clear matters such as historical content. It is important to be conscientious in securing clear client instructions before conveying them. It is important to ensure when you write, "I am instructed" that you are in fact so instructed. It is important to ensure you really do have proper authority to give an undertaking.

The consequences of inaccuracy can be disastrous. It may harm the client's case in a way that may be either irretrievable or sets it back a considerable measure. It may harm your professional standing. It may result in a suit against you for professional negligence.

It is unethical. Well, it is if it is an inaccuracy the solicitor was aware of before sending the letter. That is dishonest. But if the inaccuracy is unwitting it may nonetheless be unethical if it is a result of a solicitor's incompetence; of a failure to properly check. It is unethical because it is a breach of the relationship of trust between solicitor and client, a breach of the assurance the solicitor will pursue the client's interests competently.

Question 5 – Does it respect the solicitor/client relationship?
This question goes to the straight forward, longstanding ethical obligations that are well known to you all. They might easily be identified by subset questions. This is not an exhaustive list but it will suffice:

a. Is the letter's content consistent with client instructions?
b. Is it necessary for the client to instruct that the letter should be sent?
c. Does the correspondence breach the duty of confidentiality to the client?
d. If the correspondence is to divulge privileged information, has the client given an informed waiver of privilege?

Question 6 – Is it clearly within the law?
Plainly, you would not send correspondence which breaks the law. If something is illegal it is unlikely to be ethical. However solicitors ought be confident that correspondence is within the law before sending it. It is simply not worth the risk of venturing into an area of uncertainty.

An example of a solicitor who flew a little close to the sun but survived is *Legal Services Commissioner v Sing* [2007] LPT 4, a decision of the Chief Justice. His Honour observed the case raised an important issue which had not arisen for active judicial consideration in Queensland for more than a century, namely how far a solicitor may ethically go in raising the prospect of recourse to criminal process with a view to encouraging the discharge of civil liability? On 4 April 2006, the respondent wrote to the complainant:

> *"We act for Susan Sing in respect of your tenancy of the above property.*
>
> *Please find enclosed copy of correspondence to the Officer-in-Charge of Southport Police Station.*
>
> *This complaint will be activated should full payment not be made on the due dates for the balance of your lease or should there be any damage to the premises beyond fair wear and tear.*
>
> *The next rental payment is due on 7 April 2006. The letting agent Ruth Ryan will collect the full payment in cash on 7 April 2006. Please contact Ruth Ryan to arrange collection.*
>
> *If you feel you are unable to meet these terms then we suggest that you make arrangements to vacate the premises at the expiration of the current month in the tenancy term."*

In his letter of explanation to the Manager of the Commission the respondent Sing said:

> *"Although the letter of 4 April 2006 was written on letterhead it is in fact signed by the registered proprietor, who is my wife Susan Sing, despite the description of the signatory immediately under the signature".*

That description was "Managing Partner, Michael Sing Lawyers, Legal Solutions."

The enclosed draft letter, the letter to the Southport Police Chief read:

> *"We act for Susan Sing in respect of the above lease. Our client wishes to make a complaint about the conduct of one Andrew Haberfield with respect to the issuance of three cheques by Andrew Haberfield on behalf of Prosport Beverage Company Pty Ltd which were dishonoured on presentation."*

It provided some details and continued:

> *"We request that Mr Haberfield and his wife be interviewed at 101 Cabana Boulevard, Benowa Waters and such action be taken as is appropriate as we believe that an examination of the account from which these cheques were written will demonstrate that at the time of issuance the signatory to the cheques could not have held any or any reasonable belief that there were funds in the account to meet payment."*

You will appreciate that passing valueless cheques is still an offence in Queensland.

Mr Haberfield complained that he had been threatened with detriment and menaces, a breach of the criminal law. The Chief Justice observed the threat should be carefully defined. It was to ask the police to investigate the dishonouring of the cheques, an investigation which if followed through may or may not have led to a prosecution. It was not actually a threat to launch criminal proceedings were civil satisfaction not made, or to institute a prosecution. His Honour referred to the old solicitors' handbook as providing no relevant guidance although he did for completeness refer to the old paragraph 18.01 which dealt with correspondence. His Honour went on:

> *"This situation falls into a category described by Professor Dal Pont the author of Lawyers' Professional Responsibility:*
>
> *'…there is arguably no ethical objection to a lawyer, instead of threatening criminal proceedings as an alternative to civil redress indicating that the possible commission of a crime (such as if goods are not returned), will be referred to the appropriate authorities.'"*

The relevant criminal provision which potentially made what the solicitor did an offence was, s 133(1) of the Criminal Code:

> *"Any person who asks for, receives or obtains or agrees or attempts to receive or obtain any property or benefit of any kind for himself, herself or any other person upon any agreement or understanding that the person will compound or conceal a crime or will abstain from, discontinue or delay a prosecution for a crime or will withhold any evidence thereof is guilty of an indictable offence."*

I pause to observe in my practise there were many occasions when I gave advice to solicitors about this provision, mostly after they had realised they may have breached it. His Honour continued:

> *"It is in any case difficult to say that, in terms of s 133(1), the respondent asked for a benefit upon an understanding he would abstain from a prosecution: other matters aside, he was not the prosecuting authority."*

The competing view is a court may interprets 133 more broadly than that and contemplate it is enough that a person is a potential complainant for the purposes of the section. It is a grey area.

His Honour was alive to this for he observed:

> *"Nevertheless the Code provision and the ethical provisions in other jurisdictions together with the Queensland cases earlier referred to, indicate that a practitioner needs to be very careful not to cross a rather finely drawn line in a situation like this.*
>
> *…The content of a lawyer's ethical obligation obviously is not defined by avoidance of criminal breach. The criminal law is relevant but the ethical bar is set at a much higher level.*
>
> *…The issue is whether his being a solicitor rendered that [the letter] objectionable in an ethical sense. Did he make improper use of his being a solicitor, and thereby exhibit a lack of the probity expected of a solicitor?"*

His Honour continued:

> *"There was in the present case nothing ethically objectionable in this treatment, albeit strong, of a party on the other side of the adversarial ledger…. It is important to note that he stopped short at foreshadowing inviting the police service to investigate the possible commission of an offence. He did not go on actually to threaten to launch a prosecution."*

His Honour observed, and you may think these comments were intended for an audience wider than merely the persons involved in this case:

> *"Pressure is daily brought to bear to encourage people to discharge their legal obligations. There is nothing legally or morally wrong with that, assuming reasonable restraint…*

> *There is a continuum applicable to practitioners, with legitimate pressure at the one end and improper intimidation at the other. It may, in any particular case, be difficult to delineate the precise point at which any application of pressure becomes improper. That is why practitioners must be extremely careful before resorting to any even arguably threatening conduct. They are well advised to err on the side of caution, as in all aspects of their professional approach. With the increasingly intense demands of clients and the high level of competition which these days characterises the practise of the law, practitioners will inevitably be asked to stretch the limits of their consciences: they must be steadfast not to yield to that temptation.*
>
> *The Tribunal is not satisfied that the pressure applied by the respondent after allowing for his professional capacity, was improper or unfair.*
>
> *I record my gratitude to the panel members for assisting me in making that value judgment."*

That last sentence, ladies and gentlemen, you might think, was judicial code for "that was close".

Returning to my point, about question 6, that case provides a good example of why I phrased the question, "Is it <u>clearly</u> within the law", not merely "Is it within the law". If in doubt as to the legality of your proposed correspondence why send it? It is much better to be safe than sorry.

Ladies and gentlemen, I feel in talking to you today, in the manner I have, that some of you may sense I perceive some sort of plague of declining standards in your correspondence. Be rest assured I do not, although I, like you, know that sometimes correspondence does go too far.

Happily we are not quite at the Rambo stage written about in America. One suspects they might have reached that stage many decades ago, for Thomas Wolfe, the American novelist, wrote to his editor in 1937:

> *"The more I have to deal with lawyers, the more I feel as if I have been compelled to take a voyage down a sewer in a glass bottom boat".*

I do not feel the same way. It has been a pleasure to be in your company here today.

Can I finish by recalling that some years ago at the Annual Bar Association Conference on the Gold Coast, there was on the Sunday morning an ethics session we had to go to get our ethics point, just as I suspect some of you have come here today to get your point.

I was at that stage one of the Bar's Ethics counsellors, just as Mr Philp was, and no doubt still is. Two barrister friends of mine, not from Cairns I hasten to add, came up to me and jokingly asked:

"Jim, we've just been having a debate, can you settle it for us? Would it be unethical to miss this ethics lecture but claim the points for it?"

I congratulate you all on turning up.

Ethical issues in correspondence between Solicitors

FNQLA 9.3.12 Relevant Provisions

Legal Profession Act 2007

219 Rules for Australian legal practitioners engaged in practice as solicitors and others

(1) The law society may make rules about legal practice in this jurisdiction engaged in by Australian legal practitioners as solicitors.

(2) The law society may make rules about engaging in legal practice in this jurisdiction as an Australian-registered foreign lawyer.

227 Binding nature of legal profession rules

(1) Legal profession rules are binding on Australian legal practitioners, Australian-registered foreign lawyers and government legal officers to whom they apply.

(2) Failure to comply with legal profession rules is capable of constituting unsatisfactory professional conduct or professional misconduct.

Legal Profession (Solicitors) Rule 2007

Object of rules

The object of these rules is to ensure that each solicitor:

(i) acts in accordance with the general principles of professional conduct;

(ii) discharges that solicitor's obligations in relation to the administration of justice; and

(iii) supplies to clients legal services of the highest standard unaffected by self interest.

Serving the interests of justice and complying with the law

A solicitor should not, in the course of engaging in legal practice, engage in, or assist, conduct which is:

(i) dishonest or otherwise discreditable to a solicitor;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.

3 Confidentiality

A solicitor must never disclose to any person, who is not a partner or employee of the solicitor's law practice, any information which is confidential to a client and acquired by the solicitor or by the solicitor's law practice during the client's retainer, unless:

3.1 the client authorises disclosure;

3.2 the solicitor is permitted or compelled by law to disclose;

3.3 the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that the law would compel its disclosure to that person, whether or not a client makes a claim of legal professional privilege or confidentiality;

3.4 the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that it is necessary to disclose that information to that person for the sole purpose of avoiding the probable commission of a serious offence;

3.5 the information has lost its confidentiality;

3.6 the solicitor obtains the information from another person who is not bound by the confidentiality owed by the solicitor to the client and who does not give the information confidentially to the solicitor; or

3.7 in the solicitor's opinion the disclosure of the information is required to prevent imminent serious physical harm to the client or to another person.

18 Communications with opponent

18.1 A solicitor must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

18.2 A solicitor must take all necessary steps to correct any false statement unknowingly made by the solicitor to the opponent as soon as possible after the solicitor becomes aware that the statement was false.

18.3 A solicitor does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.
…

Relations with other practitioners (Statement of general principle)

In all of their dealings with other practitioners, solicitors should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in

order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.

21 Communications

A solicitor, in all of the solicitor's dealings with other legal practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the solicitor's communications are courteous and that the solicitor avoids offensive or provocative language or conduct.

22 Undertakings

22.1 A solicitor who, in the course of the solicitor's practice, communicates with another legal practitioner or their employee orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the solicitor personally to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other legal practitioner will rely on it must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.

22.2 A solicitor must not give to another legal practitioner or their employee an undertaking compliance with which requires the co-operation of a third party, who is not a party to the undertaking, and whose co-operation cannot be guaranteed by the solicitor.

22.3 A solicitor must not, in the course of the solicitor's practice, seek from another legal practitioner or that legal practitioner's employee, an undertaking, compliance with which would require the co-operation of a third party who is not a party to the undertaking, and whose co-operation could not be guaranteed by the legal practitioner or employee asked to give the undertaking.

Relations with third parties

28 Communications

A solicitor must not, in connection with the practice of law, in any communication with another person:

28.1 represent to that person that anything is true which the solicitor knows, or reasonably believes, is untrue; or

28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the solicitor's client; or

28.3 threaten the institution of criminal or disciplinary proceedings against the other person in default of the person's satisfying a concurrent civil liability to the solicitor's client.

28.4 where the other person is not, to the solicitor's knowledge, represented by another legal practitioner, assert that the other person should submit to a personal interview or do some act that might affect the legal rights of that person without first suggesting that the person seek independent legal advice.

28.5 make any statement that is abusive, offensive or insulting or which is unbecoming of a solicitor or which could bring the profession into disrepute.

30 Standard of conduct

A solicitor must not engage in conduct, whether in the course of practice or otherwise, which is:

30.1 dishonest;

30.2 calculated, or likely to a material degree, to:

(a) be prejudicial to the administration of justice;

(b) diminish public confidence in the administration of justice;

(c) adversely prejudice a solicitor's ability to practice according to these rules.

37 Supervision

A principal is responsible for exercising reasonable supervision over solicitors and all other employees in their provision of legal services by the law practice.