

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 convinced 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

Lawyers are not allowed to communicate directly with another lawyer's client except in very limited circumstances. At court, in court proceedings or generally, a lawyer must not deal directly with the opposing lawyer's client unless:

- the opposing legal representative has consented, or
- the circumstances are urgent and the communication would not be unfair to the opposing legal representative's client, or
- the communication is solely to ask if the person is represented and, if so, by whom.

Opposing Representatives

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.

Opposing barrister's duties at court

Sometimes the other party may have engaged a barrister, particularly for the court appearances. In Tasmania, barristers are required to comply with the *Legal Profession (Barristers) Rules 2016* ('the Rules'). The Rules govern a barrister's conduct at court and include the following principles:

- A lawyer must not knowingly make a false or misleading statement to the opponent in relation to the case (including its settlement).
- A barrister must take all necessary steps to correct any false or misleading statement unknowingly made by the barrister to an opponent as soon as possible after the barrister becomes aware that the statement was false or misleading.
- A barrister does not make a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.

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.

Opposing Representatives

Case Study 1

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

The Board noted that issues arising from the multiple applications were more appropriately dealt with by the Court, including in relation to applications 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, 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 that the 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 that in such a mediation the parties may be in positions of agreement on some matters and in opposition on others. The ICL drafted a Minute of Consent Orders and all of the parties were given an appropriate time to respond, failing which the matter would proceed to the next step in the Court process.

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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