A Third Way

Last year I wrote about the fact the Judges in both the High Court and State Courts had observed an increasing incidence of lapses in courtesy as well as inappropriate conduct in Court (which I shall refer to as "ICC") by counsel. While this behaviour was, and I believe is, confined to a minority of the litigation bar, it was still significant enough for the Courts to raise with my Council or our various committee chairs on several occasions.

Having considered the feedback and information from the Courts, which was detailed and specific, Council was of the view that we could not ignore the unsatisfactory conduct disclosed, which if unchecked, would ultimately undermine our efforts to develop a truly world class litigation bar at all levels, which we need to do if we intend to "future proof" ourselves from the global competition we will face. While I do not intend to go into the behaviour cited, some of the problems arose from ignorance, some from overzealousness, and others from insensitivity to boundaries or lack of consideration for fellow counsel or the Courts, or a combination of the above. There were instances of ICC which would probably justify a complaint and the commencement of disciplinary proceedings, and others which would not, but were undesirable nonetheless.

In response to this, an ad hoc Study Committee under the SAL's Professional Affairs Committee chaired by Justice Quentin Loh was formed in 2015. The Law Society had six representatives, including our then Vice-Presidents Gregory Vijayendran and Kelvin Wong, and myself. The majority of the Study Committee comprised practising lawyers and included two former Law Society Presidents and other senior members of the bar.

One of our early conclusions was that given the variations of ICC in issue, the range of formal disciplinary remedies was too limited. The Courts had a binary decision – complain and constitute an Inquiry Committee or Disciplinary Tribunal, or simply do nothing. This created a situation which almost counter-productively, encouraged more complaints rather than fewer. It was also felt that a disciplinary proceeding, whatever the outcome, did not always truly address the root causes of some of the diverse instances of ICC.

A middle ground was needed, one that could potentially lead to a de-escalation of the complaints. The solution that the Study Committee ultimately agreed on was to institute a non-regulatory and non-statutory Protocol between the Courts and the Council where ICC by counsel could be rectified informally. Moving forward, a complaint triggering the disciplinary process does not necessarily have to be both the first and last resort, but will be managed with a "lighter touch".

So what exactly is this Protocol?

First, the High Court or State Courts will have the option of dealing with an ICC incident in three ways – ignore it, make a complaint (which are the two existing options), or a third way, through this Protocol.

Second, where the Protocol is activated, the relevant Court registry will write to the Law Society's Director of Representation and Law Reform. The letter will contain details of the Court's feedback of the perceived incident of ICC and request the assistance of the Law Society to reach out to the member for the purpose of (1) giving him/her the feedback, and/or (2) requiring that lawyer to consider going for training or counselling by a senior lawyer (as may be appropriate), and reminding that lawyer of his or her duties to the Court.

Third, as this is purely voluntary, it is up to that lawyer to agree or not agree to undergo the required training or counselling. If that lawyer agrees to and attends the relevant training or counselling, the Law Society will inform the relevant registry in writing. If the Court is satisfied with the steps taken by the lawyer to address the issue, the matter will likely be considered resolved and no further steps will be taken.

Fourth, if the lawyer disagrees, that is the lawyer's prerogative. The Law Society will apprise the Court of the decision. It will then be up to the Court to consider and decide if it wishes to proceed with a complaint under s 85(1) or s 85(3) of the LPA.

In either instance, a record of the request for assistance and the outcome will be kept by the Court and the Law

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Society. The Court may subsequently on another occasion, when deciding whether to avail themselves of the more de-escalated Protocol, also be guided by the prior incidents of ICC feedback given, and the outcomes of such feedback.

In order to aid with the counselling, the Law Society will call on members of the Senior Counsel Forum as well as other senior members of the litigation bar to help, which they have already been doing from time to time.

Other measures have also been instituted – a regular ethics column in the Law Gazette; more articles on ethics and professional courtesy are in the pipeline, modules on Court etiquette are being prepared for Part B students, practice trainees and the Legal Practice Management Course. For lawyers who need to accumulate mandatory CPD points, we are considering a compulsory ethics course, and FAQs on Court Etiquette will be published and updated regularly on our website.

What is likely to directly affect all litigation lawyers directly is our online questionnaire. Subject to completing amendments to the LPA, we intend to require lawyers who identify dispute resolution as one of their practice areas to complete an online questionnaire before they can submit their application for a practising certificate. We have also sought amendments to the LPA to allow Council to mandate the appropriate training and counselling as concurrent or alternative remedies to our existing but limited options of imposing a fine, issuing a reprimand or a warning. Again, the hope is that the existence of more nuanced powers will allow Council to impose more proportionate and solution-oriented remedies.

There is an aspect of ICC by counsel that I wish to specifically address, being the issue of punctuality. This is something that has of late attracted comment, in the State Courts, in our High Court (and even the Singapore International Commercial Court!), and most explicitly, in Justice Choo Han Teck's written grounds in a part call application cited as [2016] SGHC 92. Of course, just because a lawyer is late does not mean that that lawyer is at fault. There are ameliorating factors such as hearings in another Court that unexpectedly overrun, or other exigencies. But in some instances, there is clearly no valid reason for the infraction.

In that same case Justice Choo quite tersely remarked:

"When counsel is late for court it is a mark of disrespect, not for the individual judge as a person, but to the court as representing a legal institution." His advice was simple – "…One has to be early to be on time. It is not only good training for lawyers but a socially conscious people, should be considerate by respecting the time of others."

Perhaps the best reason to be mindful of ensuring that our conduct in Court is beyond reproach, is that our juniors are watching both us, as well as our opposing counsel, and our conduct and attitudes are transmitted by osmosis to the next generation of lawyers. Justice Choo closes out the point with this parting volley: "The best lesson a senior supervising solicitor imparts to his junior is by being an exemplary role model".

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