

Courtesy & Civility in Dealings Between Lawyers

Deone Provera

Barrister

Marbury Chambers

McDonald v Legal Services Commissioner (No 2) [2017] VSC 89 (14 December 2017)

- On 29 August 2011, Lander & Rogers wrote to Mr McDonald by email with an offer of \$500 in full and final settlement;
- On 30 August 2011, Mr McDonald wrote to Lander & Rogers in the following material terms:

We refer to the letters of 25 August 2011 and 29 August 2011.

*It is unpleasant to describe Mr Catanese as **fundamentally dishonest**, and it is a slur on Mr Catanese's career as a lawyer that he starts off at any early stage of his career telling lies. It is fundamental to the smooth operation of the legal system that people act with integrity and honesty and Mr Catanese should be counselled to do this.*

Your letter of 29 August 2011 contains an offer of \$500 gross which is not a genuine offer of settlement and does not meet the requirements of the Civil Procedure Act. If it were produced for [sic] the question of costs as you indicate, it would demonstrate that there is a lack of good faith being displayed in the correspondence.

Should you wish to engage in meaningful negotiations please let us have a more sensible offer within 24 hours.

later on 30 August 2011, Lander & Rogers wrote to Mr McDonald in the following material terms:

Your letter is highly unprofessional, defamatory and outrageous.

There is absolutely no basis for your allegation that Mr Catanese is 'fundamentally dishonest' or that he has told 'lies'.

Unless you unconditionally withdraw your letter by 12.00 noon today, your letter will be referred to the Legal Services Commissioner without further notice.

We look forward to your immediate response.

- On 2 September 2011, Lander & Rogers wrote to Mr McDonald attaching a draft complaint to the Commissioner and seeking the unconditional withdrawal of the allegation;
- On 2 September 2011, Mr McDonald wrote to Lander & Rogers in the following material terms:

I refer to your earlier letter today. As indicated in my telephone conversation with you on Tuesday I stand rigidly by all the statements that I actually made about Mr Catanese. I have not bothered to read the document entitled Draft Complaint or any of the attachments which I presume is a lot of self-serving nonsense following your unsuccessful and misguided attempt to extricate Mr Catanese from the problem he had created for himself. I welcome any independent inquiry into this matter and will not be bullied or blackmailed by you or anyone else and that has been my position throughout my career.

Indeed I will repeat the statement that Mr Catanese was dishonest. The dishonesty was deliberate and calculated:

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“the cases suggest that disciplinary tribunals across jurisdictions will have a fairly high tolerance for robust communications, including criticisms of other legal actors. They will express concern where lawyers have become so zealous as to compromise their independence, or have acted out of annoyance or feelings that the actions of others have slighted them personally. Even if a lawyer is confronted by a ‘rogue’ lawyer, it is not the role of the lawyer to pursue ‘vigilante justice’ by intemperate remarks or communications that do not promote resolution of the client’s dispute.

I would indorse the italicised remarks, which reflect an interesting decision in a Canadian disciplinary tribunal.

However, VCAT’s assessment of Mr McDonald’s evidence in this connection was also undermined by its failure to take into account his reasonable belief that Mr Catanese had lied to him, his reasonable belief that the offer of \$500 was not genuine, Lander & Rogers’ threat to report him to the Commissioner and his response to that threat, which were all connected with the negotiations. As Mr McDonald must be taken reasonably to have believed, his personal and professional positions were both implicated by Lander & Rogers’ negotiating ‘tactics’ and he had to make a judgment about how to proceed in his client’s best interests. I think Mr McDonald was deposing, if clumsily, that it was not simply a matter of whether the employer was prepared to negotiate, as evidenced by the \$500 offer. Mr McDonald was duty bound to obtain the best outcome for his client in the negotiations. From Mr McDonald’s point of view, which had to be accepted as open on the found facts, in attacking him personally, Lander & Rogers were weakening his client’s negotiating position. As he saw it, this meant that there was not much scope for nicety in responding and he robustly stood up for himself and therefore his client. Whether the course he took was the optimum one in terms of effective advocacy is debatable, but not here in issue. It was one that was open to him in the circumstances.”

All correspondence should be:

1. Be addressed to a specific recipient
2. Be dated – this is auto-generated with emails but should be on all letters
3. Have a subject line. This should identify the name of the relevant matter or basis for the communication, typically with your client's name first e.g. Smith v Hussain, or Hussain ats Smith
4. Commence with a salutation, either to a specific person or general such as “Dear colleagues”
5. Use appropriate or neutral pronouns, and non-gendered language
6. The text should commence or end with a call to action – requesting action by the recipient
7. End with a polite closing
8. Contain a signature block. This can include your preferred pronoun.
9. Include the statement in the footer “Liability limited by a scheme approved under Professional Standards Legislation” printed in a size not less than Times New Roman 8-point font.

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCRs)

4 Other fundamental ethical duties

4.1 A solicitor must also—

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,

4.1.2 be honest and courteous in all dealings in the course of legal practice,

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,

4.1.4 avoid any compromise to their integrity and professional independence, and

4.1.5 comply with these Rules and the law.

5 Standard of conduct—dishonest or disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which—

5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law, or

5.1.2 is likely to a material degree to—

(i) be prejudicial to, or diminish the public confidence in, the administration of justice, or

(ii) bring the profession into disrepute.

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCRs)

32 Unfounded allegations

32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

34 Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client—

34.1.1 make any statement to another person—

- (i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and
- (ii) which misleads or intimidates the other person,

34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied, or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

CPD Talk 2026 reference material

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Angela Cumming, “Ethics: The benefits of courtesy” October 2024 Law Institute Journal, Law Institute of Victoria

https://www.liv.asn.au/web/law_institute_journal_and_news/web/lij/year/2024/10october/ethics__the_benefits_of_courtesy.aspx?srsltid=AfmBOoqzxPoMpGfJYM8g1tIKTs_bX6doqdpCi5hhCYydfYOb_s6-dcAp

Chris George, “Civility between Advocates in Adversarial Litigation” (2023) 93(1) Hearsay

Paula Baron and Lillian Corbin, ‘Robust Communications or Civility — Where Do We Draw the Line?’ (2015) 18(1) Legal Ethics 1, 23.

Richard Fleming, “The Obligation of Courtesy” (2020) 94(7) LIJ 24

McDonald v Legal Services Commissioner (No 2) [2017] VSC 89 (14 December 2017)

Clyne v New South Wales Bar Association [1960] HCA 40