

Trial by media



As the number of cases receiving significant media attention grows, Joe Murphy and Alana Paterson ask where lawyers need to draw the line when it comes to engaging with the press.

It is over a year now since the Fraser-Kirk v David Jones matter hit the press. DJs lost its CEO, took a huge hit on reputation, shares and legal costs and was left with a hefty compensation payment. But what part did the media play in the outcome? More importantly, what are the limits on the role a practitioner can take in those circumstances?

As a practitioner, you may have been shocked at the time about the degree of detail disclosed to the media and the speed at which it was hitting the news (we were). You may have been even more shocked to find that the statement of claim filed in the Federal Court was posted on the internet for all to see and access (complete with court seal and the amount paid for filing ... \$894).

Non-legal or illegitimate tactics in litigation are fraught with ethical dilemmas. Parties have been known to launch legal action that is frivolous, vexatious or lacking in substance in order to obtain an outcome that is perhaps not legitimately connected to the cause of action. Lodging an appeal in a matter to try and settle a lost case in the face of a large costs order can be one such tactic.

We are not suggesting that Fraser-Kirk didn't have a genuine case to bring. In fact (if you believe everything you read in the media) the CEO did publicly admit some conduct that, at face value, could attract an adverse finding. However, the case did settle for a whopping \$850,000 and a significant number of commentators took the view that the case was worth nothing like that. Since that matter, a number of other cases have emerged in the press, for example, the Styles v Clayton Utz case and even more recently, the case being touted as the \$9 million case against Pacific Brands.

While media coverage can be a problem



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outside the courtroom, cases are usually conducted in open court. In the Fraser-Kirk v DJs case, Justice Flick commented about the media attention the case had received (nationally and internationally) and said; "Care should be exercised when making submissions to the Court not to make statements which were more in the nature of a 'media release' than a submission which provided genuine assistance to the Court ... and the interests of all parties protected".

When the trial judge is aware of the extensive media coverage of a matter, the degree of prejudice (if any) is difficult to gauge. In *R v Gordon Wood*, the Carolyn Byrne murder trial, some media went so far as to claim partial responsibility for securing a guilty verdict and his family agreed, complaining that he did not receive a fair trial.

If, and we stress if, the lawyers for Fraser-Kirk set about deliberately disseminating the details of that case to the media, then that is a course that must be travelled with absolute caution. Legal practitioners must be conscious of ethical duties and responsibilities to both the client and the court (generally); substantive law restrictions (specific rules and whether any orders have been made about disclosure); and potential impacts of any disclosure (short and long term for the lawyers and the client!).

Ethical and other considerations

Aside from the Bar Rules, NSW and a number of other states have not adopted the 'integrity of hearings rule' from the LCA Model Rules. Victoria has and, in view of a practitioner's general obligations, it is applicable to all as a guide. It says; "A practitioner must not publish, or take steps towards the publication of, any material concerning current proceedings for which the practitioner is engaged which may prejudice a fair trial of those proceedings or prejudice the administration of justice".

Counsel are permitted to provide copies of documents used in proceedings with the consent of the instructing solicitor or the client and are also allowed to answer unsolicited questions from the media about the matter, provided that they do not provide coloured comment,

unnecessary description or express their own opinions on matters relevant to the case.

In *MG v R [2007]* the court noted that the Legal Services Commissioner found the Crown Prosecutor had breached the rules because of comments made about the evidence in a particular case in which she appeared at a university lecture. Those comments were subsequently reported in newspapers. In that case the LSC dismissed the complaint because the breach "was in no way deliberate, being a technical contravention of a complex rule deriving from an error of a judgement".

Practitioners must also be mindful of their duty to the client, which requires primary consideration of the client's best interests, including confidential information.

In *Legal Services Commissioner v Tampoe [2009]*, a practitioner was struck off the roll after publicly disparaging his former client (Schapelle Corby) and her family. This included disclosing confidential information about his client's defence without authority. In response to this matter, the Law Society suggested practitioners should seek consent before making any public statement about a client's matter (a trite suggestion).

The culture or policies of a practitioner's firm may also have an impact. Some will take a strict approach against media or public comment, whilst others will take a more strategic or liberal approach and provide comment to the media or publish details about matters it acts in.

Practitioners need to be mindful that particular documents, such as witness statements, may be subject of an implied undertaking to the court precluding disclosure, despite the fact they have been read in open court or found their way into the public domain.

A practitioner can be at risk of being in contempt of court if they provide details to the media about a matter resulting in publication that may have a tendency to cause prejudice to proceedings. This is not such a problem if done in the public interest of freedom of discussion, and dissemination of information, about a matter of public importance.

While the issue of the public interest is an important concept in law, the courts have said, in

Hinch v Attorney General [1987], that "the public interest in free discussion and in alerting the community to risk does not warrant a desertion of the public interest in securing a fair trial".

Errors inside and outside court

The impact of mishandling a client's case or falling foul of professional obligations extends beyond the risk of disciplinary action, and may include:

- reputational risks for all parties involved (including the practitioners!);
- the personal toll on the client. As an observation only, both Fraser-Kirk and Styles have appeared distressed by the media attention when appearing on television. Fraser-Kirk has also reportedly moved to Singapore for a fresh start;
- the media expressing views about the merits of a case and placing improper pressure on a party to settle by prejudging the proceedings or by placing the responding party in a position where they feel they have to buy their way out of a case to salvage what is left of their brand reputation;
- trial judges and jurors can be inappropriately influenced and a party may be unfairly prejudiced in a case; and
- restrictions on the ability of a practitioner or their firm to continue to act in a matter where they have fallen foul of their obligations.

One might ask whether the media should be taking any responsibility. The media do have the Australian Journalists' Code and the Media Entertainment and Arts Alliance Code of Ethics. However, compliance with these codes does not always mean compliance with the law - but that can be left for another article.

Media interest in court proceedings and legal stories provides a great source of temptation for practitioners when seeking to achieve an outcome. These issues present ethical challenges for practitioners, so it is important for them to be familiar with their ethical obligations as well as to understand the conflicts and ramifications that flow. **LW**

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