



**Should barristers be more willing to take legal action against non-paying solicitors? Or are barristers hamstrung by a variation of the 'prisoners dilemma': if only one barrister sues then work will flow to other barristers who do not; but if all barristers sue then each barrister will more likely be paid since the work cannot flow to 'non-suing' barristers. The maximum gain is if barristers cooperate, and everyone sues every non-paying solicitor. But each individual's fear of losing briefs if they sue prevents them from taking action, with result that all barristers lose whenever a solicitor does not pay.**

It is passing strange that, for a group of people who go to court for others for a living, we are so reticent to engage in litigation ourselves. Perhaps we know only too well how prolonged, expensive and potentially fruitless such actions can be. Perhaps also it stems from the tradition of the 'gentlemen's agreement' for payment and not insistence of it as of right. However, we hear what you say, and we love your application of game theory even though we do not, ourselves, believe that barristers refrain from acting against delinquent solicitors for fear of scaring off the diligent or that diligent solicitors would be wary of the barristers who do. We are fairly confident that no barrister competes for the work of non-paying solicitors.

Legend has it that, back in the day, barristers used to circulate a 'blacklist' of solicitors who failed to pay. The beauty of the blacklist was that it gave grounds to barristers to refuse briefs for fear of non-payment. Understandably, such collusion could not persist with the advent of the *Trade Practices Act 1974* (Cth) and the blacklist was abandoned.

Presently, the Bar Association provides fee recovery assistance for invoices which have been outstanding for more than three months, but less than two years. The Bar Association will write and then call the solicitors seeking an explanation. We used the service once, years ago. The invoice remains unpaid. And while we would have preferred payment, we do not regret the extra 'hassle' that was imposed on the ethically and time impoverished solicitors and hope it gave them pause for thought before doing the same to another barrister.

If you do decide to sue, you would be wise to ensure that your costs agreement, estimate and invoicing are not just compliant, but that they are beyond reproach. It is not unknown for a recalcitrant solicitor to cross-claim for defective work or overcharging and to lodge a complaint.

A better approach may be one of prevention and not reaction. We suggest that you, especially if you are recently admitted or taking on a new solicitor, insist that moneys be paid into trust sufficient to cover your estimated fees. If the solicitor cannot confirm that moneys have been paid into trust, you may reconsider accepting the brief. As time goes by, you will build relationships with solicitors you can trust to pay you. The odd ones who do not will not benefit

from your services again and you may write off those fees as a cost of business. However, only you can decide whether it is worth directing your time and energy to recouping fees from solicitors with whom you have no future or providing excellent service to those solicitors with whom you do.

**Inspired by Greg Norman's breakaway golf tour I'm considering forming my own bar association. My association will not be constrained by burdensome Barristers Rules or time-consuming costs disclosures. We won't be brought to heel by statutes, state governments or solicitors. The sole purpose of our association will be to get work, get paid for it and to hell with everyone else. We'll advertise, we'll appoint our own queen's counsel (that'll stump the current mob) and our motto will be Servant of One. Do you see any pitfalls in our unregulated approach and, more importantly, will you join us?**

We are most chuffed that you asked us to join your new bar association or 'the B League' if we might be so presumptuous as to give it a name. For the longest time, we have been itching to don a Viking headdress, smear paint on our faces and storm the Bar Association for the purpose of starting a brave new libertarian order, or at least getting a really cool selfie standing on the president's chair.

It did, momentarily, occur to us that the B League's 'to hell with everyone' and let's advertise approach might not be the best fit for anonymous agony aunts advising on ethical conundrums. Also, your sporting allusion gave rise to a small qualm, fleeting we assure you, that the B League might be backed by a despotic regime with unfriendly attitudes to column writers and women, or worse, that it may require its members to play golf. And then there was the slightest concern that eschewing statute and regulation may not really be in our profession's long-term interests given our work is largely advising on the same. We must also confess to having had some misgivings, which we promise were very small, that the B League's proposed framework might cause us to regress to some Hobbesian natural state of unregulated chaos and, thereby, render our professional lives 'nasty, brutish and short'. And then we began to wonder, and this was just a passing reflection, about the potentially ruinous effect such actions might have on Western liberal democracies more generally: as they transition from the relatively stable political divisions of left versus right, progressive versus conservative and labour versus capital in order to cleave precariously to the new fault lines of individualism versus communitarianism, will the establishment of the B League be the tipping point by which such societies' institutions are rendered completely ineffective in preventing our inevitable slide into anarchy?

But what of these trifles? Count us in!

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