

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 9 - Mistake and professional misconduct. Where is the line?

Presented by Stephen Coyle, Partner and Lisa Gooneratne, Special Counsel

Friday, 11 March 2022

Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Mistake and professional misconduct Where is the line?

- The less common professional conduct decisions involving lawyers and professional misconduct. Where the line exists between honest mistakes, oversights and professional misconduct and how that can relate to in-house lawyers.
- Is there a line?
- Not all negligent acts of a lawyer amount to unsatisfactory professional conduct or professional misconduct warranting disciplinary action.

Mistake and professional misconduct

Where is the line?

- For example:
 - A lawyer who does not know that a contract for the sale of land must be stamped before it can be registered shows a lack of professional competence and diligence. This could lead to disciplinary action.
 - A lawyer might know that a contract needs to be stamped but makes a simple mistake when calculating the amount of stamp duty due. This may be negligent - but not a breach which would lead to disciplinary action.
- Very few complaints of negligence amount to unsatisfactory professional conduct or professional misconduct.

Legal framework

- *Australian Solicitors Conduct Rules 2015*
- *Legal Profession (Solicitors) Conduct Rules 2015 (ACT)*
- *Legal Professional Act 2006 (ACT)*

Legal Profession (Solicitors) Conduct Rules 2015

- Paramount Duty to the Court / Administration of Justice – rule 3
- Other Fundamental Ethical Duties – rule 4
- Dishonest and Disreputable Conduct – rule 5
- Confidentiality – rule 9
- Conflicts – rules 10, 11 and 12
- Independence – Avoiding personal bias – rule 17
- Frankness in Court – rule 19
- Responsible use of Court process and privilege – rule 21
- Communication with opponents – rule 22
- Witnesses – rules 23, 24, 25, 26 , 27
- Public Comment during proceeding – rule 28
- Another solicitor's error – rule 30
- Unfounded allegations – rule 32
- Dealings with other person – rules 33, 34 and 35

Legal Professional Act 2006 (ACT)

- Unsatisfactory professional conduct – section 386
- Professional misconduct – section 387
- Conduct capable of being unsatisfactory professional conduct or professional misconduct – section 389
- Disciplinary action – section 447
- Register of Disciplinary Action – section 448

Unsatisfactory professional conduct – s386

- Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner

Conduct that may be capable of being unsatisfactory professional conduct

- Threatening or abusive behaviour
- Failure to comply with an undertaking
- Poor advice and representation
- Serious delay
- Non-disclosure of costs
- Minor breach of the Solicitors Conduct or Practice Rules or confidentiality

Professional misconduct – s387

- (1) ..."professional misconduct" includes —
 - (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.
– s387 *Legal Professional Act 2006* (ACT)

Conduct that may be capable of being professional misconduct

- Gross overcharging
- Conflicts of interest
- Acting contrary to instructions
- Misleading or dishonest conduct in or outside court
- Misappropriation of trust money
- False certification or false witnessing of documents

'there are no fixed categories of professional misconduct. Much depends on whether the conduct falls outside "generally accepted standard[s] of common decency and common fairness."' - Bechara v Legal Services Commissioner [2010] NSWCA 369 (at [44])

Conduct capable of being unsatisfactory professional conduct/professional misconduct – s389

“...Without limiting section 386 or section 387, the following conduct can be unsatisfactory professional conduct or professional misconduct:

- (a) conduct consisting of a contravention of this Act;
- (b) charging of excessive legal costs in connection with the practice of law;
- (c) conduct in relation to which there is a conviction for —
 - (i) a serious offence; or
 - (ii) a tax offence; or
 - (iii) an offence involving dishonesty;
- (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
- (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
- (f) conduct of an Australian legal practitioner in failing to comply with an order of the ACAT made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay all or part of a fine imposed under this Act or a corresponding law);
- (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

Note: Various provisions of this Act identify particular conduct as conduct that can be unsatisfactory professional conduct or professional misconduct (see eg s 138 (1) (Obligations of legal practitioner partner relating to misconduct— multidisciplinary partnerships))

Disciplinary action – s447

- Under section 447 disciplinary action means:
 - a) the making of an order by a court or tribunal for or following a finding of professional misconduct or unsatisfactory professional conduct by an Australian legal practitioner under this Act or a corresponding law; or
 - b) any of the following actions taken under this Act or under a corresponding law, following a finding by a court or tribunal of professional misconduct or unsatisfactory professional conduct by an Australian legal practitioner:
 - i. removal of the name of a practitioner from an Australian roll
 - ii. the suspension or cancellation of the Australian practising certificate of the practitioner
 - iii. the refusal to grant or renew an Australian practising certificate applied for by the practitioner;
 - iv. the appointment of a receiver of all or any of the practitioner's property or the appointment of a manager of the practitioner's practice; or
 - c) the making of an order by a court or tribunal for or following a finding of unsatisfactory employment conduct by an employee of a solicitor under this Act.

Register of Disciplinary Action – s448

- Part 4.9 of the *Legal Profession Act 2006* requires the Law Society, as the licensing body, to maintain a *Register of Disciplinary Action*.
- Sub section 448 (2) states that the register must include:
 - a) the full name of the person against whom the disciplinary action was taken; and
 - b) the person's business address or former business address; and
 - c) the person's home jurisdiction or most recent home jurisdiction; and
 - d) particulars of the disciplinary action taken; and
 - e) other particulars prescribed by regulation.

Bolitho v Banksia Securities Ltd (No 18) (remitter) [2021] VSC 666 (“Banksia Securities”)

- Issues of misconduct that arise in Banksia:
 - Misleading or failing to correct the Court
 - Commencing proceedings without proper basis
 - Conduct with self-represented litigants
 - Issues regarding experts
 - Issues involving witnesses
 - Issues arising from tax records/personal life
 - Bankruptcy
 - Unreasonable delay

Banksia Securities

“a stain on the integrity of the profession” – Dixon J

- Key facts
 - In November 2018, the Court of Appeal remitted the Banksia Securities Limited group proceedings to consider Australian Funding Partners Limited ('AFP'), litigation funder, application to be reimbursed \$5.2 million in legal costs and \$14.1 million in litigation funding commission following a \$64 million settlement reached in December 2017.
 - In March 2019, the court-appointed Contradictor alleged breaches of the overarching obligations, fiduciary duties, professional conduct rules and the funding agreement to an extent that AFP ought not be entitled to recover any amount.
 - Found that the litigation funder and the five lawyers involved engaged in egregious conduct in connection with a fraudulent scheme to an extent which would have shattered confidence and the honour in the legal profession.

Banksia Securities

The “right hand man” – Mr Alex Elliott’s role

- Alex Elliott, the son of Mark Elliott, became involved in the proceedings from early 2016.
- Admitted on 13 December 2016 and held a practising certificate since 11 May 2017.
- Was a director of Elliott Legal between 16 May 2016 and 5 June 2017.
- Attempted to characterise his role as a “personal assistant” however was described by others as his father’s “right hand man”.
- Alex Elliott contended that he was not knowingly complicit in the deception of others.
- Attempted to explain his failure to identify deception, regardless of being privy to sufficient information to reach such a conclusion, was due to:
 - his limited legal experience;
 - the trust he placed in others; and
 - his natural deference to the judgement of others.
- Was found to be an unsatisfactory witness, primarily concerned with self-preservation.

Banksia Securities

The “*Post Box Solicitor*” – Mr Zita’s role

- On 26 November 2014, it was ruled that Mark Elliott (principal solicitor) and Mr Norman O’Bryan SC (principal Senior Counsel) be restrained from acting for Mr Bolitho in the proceedings.
- This was because, among other reasons, Mark Elliott and Mr O’Bryan’s wife, Ms Noy, each had a substantial interest of approximately 45% in AFP.
- Mark Elliott subsequently approached Mr Anthony Zita to act as agent and solicitor on record in the proceedings.
- Mr Zita had no experience in group proceedings, however accepted and was appointed as Mr Bolitho’s acting solicitor.
- Mr Zita was labelled a “Post Box Solicitor” as he:
 - acted as a conduit for Mark Elliott, O’Bryan and Symons to run litigation as they saw fit;
 - did not ever himself draft correspondence or emails;
 - allowed the above solicitors to access email addresses and blind copied them into all correspondence; and
 - did not exercise any independent judgement.

Banksia Securities

The Judgement

- His Honour, the Honourable Justice John Dixon, ordered that:
 - Mr Norman O’Bryan and Mr Michael Symons (junior Counsel in proceedings) be removed from the roll;
 - Mr Anthony Zita and Mr Alex Elliott (solicitors) each show cause as to whether they are fit and proper to remain on the roll;
 - The reasons for judgement and the record of the trial be referred to the DPP for any further investigation and action thought appropriate; and
 - That AFP and the Lawyers involved pay to the first defendant, the receiver of Banksia Securities Limited (in liq):
 - Compensation of \$11,700,128;
 - The costs of and incidental to Supreme Court proceeding number S APCI 2018 0037 and the costs of and incidental to the remitter, assessed on an indemnity basis; and
 - The Contradictor’s costs of an incidental to the remitter on an indemnity basis.
- Mr Zita and Mr Elliott’s hearings are yet to be published.
- AFP declared bankruptcy as a result of the judgement.

Misleading or failing to correct the Court, Tribunal, or other parties

- *Chamberlain v The Law Society of the Australian Capital Territory* [1993] FCA 776; 118 ALR 54
- *Council of the New South Wales Bar Association v Dwyer* [2015] NSWCA 302
 - ‘Mr Dwyer’s conduct strikes at the heart of the obligation of candour that is expected of a legal practitioner.’
- *Legal Services Commission v Garrett* [2009] LPT 12
 - AsJ Mossop in *Kaye v Woods* – ‘...it makes clear the separate obligation upon a solicitor to ensure that statements made on behalf of the client are not misleading.’ [138]
 - ‘Garrett provides an example of a case where even counsel’s considered, but incorrect, advice provided no defence to the charge of failing to meet appropriate professional standards.’ [138]

Misleading or failing to correct the Court, Tribunal, or other parties

- *Kaye v Woods (No 2)* [2016] ACTSC 87
 - Mossop AsJ (as he then was) made the following comments:
 - *'Therefore in civil proceedings where the other party is present there may not, in the absence of some additional obligation, be a duty of full disclosure of the relevant facts contrary to the interests or instructions of the client. However, the authorities referred to above make it absolutely clear that there is a duty of honesty which extends to avoiding misleading the Court...'* [118]
 - *'That duty to be honest extends to not putting forward facts which are liable to, or which in fact, mislead the Court or the opponent...It extends to conduct to mislead even where no false statement is made expressly or impliedly...Further, it is a breach of a duty to mislead the court temporarily. Therefore the fact that the true position is likely to emerge during the course of evidence is not sufficient to excuse a practitioner for misleading the court.'* [119]
 - *'The obligation on a solicitor to correct misleading statements to a court must be at least as strict as that to correct statements made to another party during the course of a mediation. Therefore, the standard applicable to a solicitor instructing the court can be no less than that articulated in Garrett.'* [139]
- *Council of the Law Society of the Australian Capital Territory v LP 201920 (David Chen) (Appeal)* [2021] ACAT 16 (11 March 2021)

Commencing proceedings without proper basis

- *Clyne v New South Wales Bar Association* (1960) 104 CLR 186; [1960] HCA 40
- *Degiorgio v Dunn (No 2)* [2005] NSWSC 3
- *Lemoto v Able Technical Pty Ltd & 2 Ors* [2005] NSWCA 153
- *Legal Profession Complaints Committee v Metaxas* [2021] WASAT 82

Conduct with self-represented litigants

- *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1439 (VIC)
- *Legal Services Commissioner v Nomikos (Legal Practice)* [2013] VCAT 1682
- *Legal Services Commissioner v Sing* [2007] LPT 004
- *Legal Profession Complaints Committee v MLS* [2010] WASAT 135
 - The following demand was made by the practitioner to his former client:

“Unless reimbursement of such is now effected to me as earlier demanded, I will proceed, on Monday 14 January 2008, to sue you for in respect of that disbursement. Legal proceedings in that regard would culminate in an interlocutory judgment as against you in respect of which I would then issue a Bankruptcy Notice.

Your failure to comply with that Bankruptcy Notice would inevitably result in my Creditor's Petition for your further sequestration, on this occasion for a period not less than five years. “

Issues regarding expert and lay witnesses

- *New South Wales Bar Association v Punch* [2008] NSWADT 78
 - Adduced evidence from witnesses which was known to be untrue
- *R v McIntyre* [2000] NSW CCA 6
 - Gratuitous rudeness to witnesses during trial
- *LPCC v Carlose* [2012] WASAT 104
 - Required witness for unnecessary cross-examination
- *Jeffrey Gilham v R* [2012] NSWCCA 131
 - Failure to call an expert witness constituted a miscarriage of justice
- *Wood v R* [2012] NSWCCA 21
 - Prosecutor misrepresented evidence of a witness

Issues arising from tax records/personal life

- *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253
- *Bryson v New South Wales Bar Association (LSD)* [2003] NSWADTAP 29
- *Council of the New South Wales Bar Association v Costigan* [2013] NSWCA 407
- *New South Wales Bar Association v Cummins* [2001] NSWCA 284
- *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145
- *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320
- *In Re Davis* [1947] HCA 53
- *Ziems v The Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46
- *New South Wales Bar Association v Murphy* [2002] NSWCA 138 (Bankruptcy)

Unreasonable delay

- *New South Wales Bar Association v Howen* [2008] NSWADT 147
- *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14
- *Legal Practitioners Conduct Board v Figwer* [2013] SASCFC 15

Other cases

- *Ibrahim v Nasr (No 2)* [2021] NSWSC 1481 - Facebook posts
- *Legal Practitioner 202021 v Council of the Law Society pf the ACT (Occupational Discipline)* [2021] ACAT 74 – Issuing a bill after 11 years
- *Legal Profession Board of Tasmania v Lester* [2021] TASSC 41 - Misleading a client
- *Victorian Legal Services Commissioner v Gulliver (Legal Practice)* [2022] VCAT 181 (18 February 2022) – Forging a client's signature
- *NSW Legal Services Commissioner v Zou* [2021] NSWCATOD 139 (7 September 2021) - Failing to properly witness an e-affidavit

So where is the line?

Questions?

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