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PROBLEM SOLVING NOT BLOOD LETTING: THE ART OF PROFESSIONAL MISCONDUCT ADVOCACY

By Justin Cotton, Partner, Practitioner Advocacy and Construction

Litigators are not always well suited to practitioner advocacy. There can be too much of a tendency to focus on concepts of right and wrong, and not admitting liability.

Litigation is by nature adversarial. It is suited to an Insurer's mindset, where an admission of liability is tantamount to surrender.

However, practitioner advocacy sometimes is more about reaching a just compromise that focuses on the future and allows:

(a) the public and community to be protected;
(b) the practitioner to improve their skills and develop;
(c) the practitioner to keep practicing if appropriate.

As practitioner misconduct is really "quasi criminal" in nature, criminal advocates are often better suited to this discrete area of law.

Taking the correct path

It is often the case that a complaint will not have been brought by a disciplinary body unless there is sound evidence of wrongdoing.

However, in those cases where the disciplinary body has not framed charges properly, or brought charges that are defendable:

- an election can be made to contest the charge(s); or
- your advocate should consider whether you can 'plea bargain', for example, in return for not contesting other charges, 'shaky' or more minor charges may be withdrawn.

If an election is made to contest charges/allegations, a longer hearing and more preparation will be required. This will involve more time, stress and legal fees. Witnesses will need to be called by both the prosecutor and also (possibly) the practitioner.

Pleading guilty

If a practitioner elects not to contest a charge or allegation, they are effectively pleading guilty. However, the practitioner has the right to present a plea in mitigation through an advocate, to minimise the sanction.

Arguments in mitigation should not be confused with arguments that are used to genuinely contest allegations. They are two different things.

A plea in mitigation may involve an explanation as to why conduct occurred, possibly framing actions in terms of honest mistakes made in good faith.

The plea will then go on to talk about other factors in the practitioner's favour eg.

- a sound prior record and good references;
- that the practitioner is remorseful and regrets any errors;
- they have acted swiftly to rectify any errors;
- that the practitioner has taken steps to improve procedures to avoid a repeat.

Where an advocate delivers submissions that deny any wrongdoing, that is at odds with creating an impression there is remorse/regret and a willingness to change. So when you are preparing for a hearing, do not try to "have your cake and eat it", because a charge is either contested or it is admitted.

Sometimes there is little possibility of contesting. For example, a charge of breaching section 16 of the *Building Act 1993* (performing building work without a building permit) is a 'strict liability' offence. The intent behind the act is of little consequence. One would need to show the practitioner did not commit the act.

Remember that "fessing up" should translate into a discount in any penalty. As is cited by Justice Kirby in *Cameron v The Queen [2002] HCA 6, at paragraph 65*:

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"A plea of guilty is ordinarily a consideration to be taken into account in mitigation of punishment."

Onus of proof

The onus of proof is higher than a mere civil standard of proof (ie more likely than not), which is the standard in commercial, contract disputes. However, it is not the criminal standard of "beyond reasonable doubt" either. It is some other test.

The seminal case is *Briginshaw v Briginshaw [1938] HCA 34*. It refers to the seriousness of the allegations made and the gravity of the consequences flowing from a finding of professional misconduct.

Based on the serious allegations and consequences, a finding affecting a person's future and livelihood should not be taken lightly by the trier of fact. In the case, reference is made to "reasonable satisfaction".

Dixon J stated in *Briginshaw*:

"In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences."

Practitioner Misconduct advocacy is a unique and defined art, and whether a practitioner represents themselves or uses a legal advocate, a special set of skills is required to ensure the right tone is set and a logical, not confused, argument is delivered.

These skills can be deployed across the spectrum of various professions, as common principles apply whether we are referring to construction practitioners, lawyers, doctors, financial advisors or a range of other industries governed by disciplinary bodies and codes of conduct.

Similar terminology such as "unsatisfactory professional conduct" and "professional misconduct", and principles of natural justice and procedural fairness, apply across different professional fields.

As a professional person faced with a misconduct complaint or inquiry, do not dice with your future. It may be a grave error to represent yourself as you may not have sufficient detachment. The better course is to seek experienced, skilled legal advice as early as possible.

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