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Advocacy with Substance: The Strategy Behind an Effective Plea In Mitigation

By Justin Cotton, Partner, Construction and Practitioner Advocacy

Once a decision is made not to contest charges at a disciplinary hearing, but to present a 'plea in mitigation', the correct strategy must be considered. Your legal advocate will of course need to go in fully prepared. It is not simply a case of "rolling over", rather it is an exercise in creating a true picture of all the circumstances, in order to gain the most favourable sentence from the trier of fact.

In fact, there is often no agreement between the defence and prosecution as to what the appropriate penalty would be, even where facts are admitted, so such hearings as these can still be adversarial in nature.

When one thinks of the word "whitewash", a scene in a Mark Twain novel is brought to mind where the protagonist is punished by being made to whitewash many yards of a paling fence. It was an unhappy scene in the novel (at least at first), and whitewashing will likewise prove an unhappy experience if it is attempted in a court or tribunal.

Do not attempt to sugar coat or whitewash the actions that occurred, or make a political statement. It may even create the impression in the mind of the judge or member that there is no genuine remorse and no real lessons learned.

With political statements, at best the judge or member will simply place such arguments in the 'too hard basket' as being outside of their jurisdiction. Such arguments may sometimes have real worth, but are best left out of a plea in mitigation in disciplinary proceedings.

The Plea in Mitigation

A good plea in mitigation should provide an explanation for any unprofessional conduct, and hopefully offer some mitigating circumstances. Such a plea will have many elements to it, and ideally, as many bases will be covered as possible.

If the situation is bleak for the client, and the facts overwhelming, it will be difficult and probably counter-productive to 'whitewash' the facts. Despite this, on many occasions you will be able to cite some form of chronology that explains why the practitioner acted the way they did, or detail circumstances that may have contributed to the offence.

Examples of other contributing or 'mitigating' factors may be:

- where a 'safety' incident is contributed to by natural conditions such as freak weather
- where there were contributing factors outside of the practitioner's control or caused by the involvement of other parties

In some cases, on a building site the prosecutor may be interested in prosecuting a number of parties. Once you obtain witness statements in a brief of evidence this will become clear, and this information may assist the defence lawyer in 'plea bargaining' with the prosecutor.

If for example a prosecuting authority is more interested in its action against a builder or owner in a development, it may agree to resolve the matter against other parties (such as a building surveyor or certifier) on the basis of undertakings as to future conduct and payment of costs. The possibilities for this will of course vary on a case by case basis. Whether such an outcome is possible will also of course depend on the overall conduct of the practitioner in all the circumstances.

At the outset, your lawyer should always obtain a full brief of evidence from the prosecutor's lawyer to assess the situation. Even where the practitioner is pleading guilty, they may want to comment on statements made by other parties in witness statements.

A good plea in mitigation follows a formula and you should try to 'tick' as many boxes as possible. If you can tick most of the boxes in your submission you have normally done as much as you can do to extract the best decision from the court or tribunal.

The ingredients of the plea

So, here are the key ingredients of a strong plea in mitigation:

- Explanation of why the conduct occurred;
- Evidence (if possible) that any mistakes were honest/

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made in good faith;
- Ownership and admission of guilt;
- Contrition and remorse;
- Changes to work practices/systems to avoid a repeat;
- Evidence of changes to behaviour/continuing education;
- References i.e. professional character references;
- The harm principal i.e. if there is no evidence of harm flowing from the conduct
- Financial limitations and distress;
- Demeanor and appearance;
- Sound prior record (i.e. is the conduct habitual or aberrational?)

Sometimes it will not be appropriate to touch on all of these elements, but you should tick as many of the boxes as you can. Where there is some wrongdoing admitted, then evidence of changes to work practices and any continuing education is invaluable.

Case law can sometimes be invoked e.g. Harm principal: *Hans v Building Professions Board [2008] NSWADT 285*. O'Connor J took significance from the fact that *"no harm of any great significance resulted from the conduct of the respondent*."

References

These are generally paramount but some science needs to be applied. You should ensure the reference hits the right notes.

The reference should ideally:

- Describe the person, their qualifications / profession and how they know the practitioner;
- Describe their professional dealings with the practitioner;
- Speak favourably about the practitioner's knowledge, professionalism, diligence, honesty etc;
- Advise the writer is aware of the complaints/allegations;
- Say something to the effect that the practitioner is remorseful about what occurred or that it is an aberration.

Avoid a reference that sends the wrong message. For example, if you are acting for a building surveyor charged with failing to adequately ensure plans are consistent, a reference that suggests the practitioner works briskly and speeds up the process would be disastrous.

Aim for at least 2 or 3 key references from someone in the person's industry. It goes without saying that these references should be as current and up-to-date as possible. As a back up, any references that also talk about character or contribution to the community are also helpful.

There will be the odd occasion where the practitioner will not be able, or will be unwilling, to obtain references. But these occasions will be the exception rather than the rule. If the practitioner has a sound record and there are other things you can say in their favour, there is no need to panic if it is not possible to obtain references, though they will certainly assist where provided.

Applicability to various professions

Practitioner conduct deals with notions of administrative law that can be translated to various different callings. For example "natural justice" or "procedural fairness" applies to all. Some terminology such as "unsatisfactory professional conduct" and "professional misconduct" also pop up in different areas.

Victorian lawyers facing complaints under the *Legal Practice Act 2004 (Vic)* are regulated by a two tiered benchmark of *unsatisfactory professional conduct* and *professional misconduct*, just as there is with private certifiers in NSW under the *Building Professionals Act 2005 (NSW)* ("the BPA").

The BPA has largely adopted the definitions of these two conduct categories from s109R of the *EPA Act 1979 (NSW)*.

Section 109R lists various factors that comprise *unsatisfactory professional conduct*. It then defines *professional misconduct* as *unsatisfactory professional conduct* of a sufficiently serious nature to justify suspension or withdrawal of the certifier's accreditation.

There are differences in terminology however, even within the construction industry. The *Building Act 1993 (Vic)* refers to *unprofessional conduct* (in s 179(1)) but does not define it. The definition remains open ended.

Generally there are two levels of censure, but given the lack of uniformity across states and professions, it is

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difficult to consistently know the difference between:

- conduct that is worthy of the highest level of disciplinary censure; versus
- conduct that attracts lesser disciplinary censure.

There are some cases that are worth mentioning across various professions e.g.

Law Society of NSW v McElvenny [2002] NSWADT 166: this looked at various factors that can be considered by a Tribunal to militate against the highest level sanction, e.g. such matters as contrition, candour with an investigation and hearing, demeanor, an otherwise sound record.

Craig v Medical Board of South Australia [2001] SASC 169: this establishes that the protection of the public is the key aim of disciplinary proceedings, not to punish a practitioner in a punitive sense. In some cases, the public might be better served in circumstances where a practitioner is allowed to continue practising, albeit with better education/systems.

Veterinary Surgeons Investigating Committee v Lloyd (Inquiry 2: Gypsy findings) [2003] NSWADT 96: this case is relevant to the onus/balance of proof in disciplinary cases. The Tribunal said the standard of proof was more than a mere balancing of scales.

What was required was: *"precise and not inexact proof of the allegations of misconduct and…a conclusion that it is comfortably satisfied that…proof of the complaint has been established."* (at paragraph 99).

As a building practitioner or professional person, if you are faced with a disciplinary proceeding or investigation, it is an extremely stressful time. It is pretty difficult not to take the process personally, and often a cool head is needed to strategise. Your lawyer will care about your plight, but will also have that level of detachment to make sound decisions. When faced with such an investigation or proceeding, you should seek experienced legal assistance as soon as possible.

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